No. ___ · 2007

IN THE

Supreme Court of the United States

GOOD NEWS EMPLOYEE ASSOCIATION, REGINA REDERFORD, ROBIN CHRISTY,

Petitioners,

v.

JOYCE M. HICKS, in her individual and official capacities as Deputy Executive Director of the Community & Economic Development Agency of the City of Oakland, ROBERT C. BOBB, in his individual and official capacities as City Manager of the City of Oakland.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the City of Oakland's opening of a limited public forum, which allows city employees to post political, religious, and social views on an employee bulletin board and interoffice e-mail system, require a strict scrutiny standard of review where viewpoint discrimination has been enforced against only select employees?

2. When does a municipal employer have a "legitimate administrative interest" in censoring the terms "natural family," "marriage," and "family values" on an open employee bulletin board and interoffice e-mail system where employee views about social events, hate, religion, homosexuality, terrorism, politics, and war are allowed?

3. Can a public official's qualified immunity be abrogated when he/she rejects a faith-based organization's equal access to an employee bulletin board because the terms "natural family," "marriage," and "family values" are considered disruptive to the efficient operation of a municipal workplace?

4. Is it a prior restraint for a municipal employer to declare, as a matter of policy, the terms "natural family," "marriage" and/or "family values" to be hate-speech per se'?

LIST OF ALL PARTIES

Petitioners: Good News Employee Association
Regina Rederford
Robin Christy

Respondents: Joyce M. Hicks, in her individual and official capacities as Deputy Executive Director of the Community & Economic Development Agency of the City of Oakland.

Robert C. Bobb, in his individual and official capacities as the City Manager of the City of Oakland.

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PETITION FOR A WRIT OF CERTIORARI

CITATIONS TO OPINIONS AND ORDERS ENTERED IN CASE

The judgment of the United States Court of Appeals for the Ninth Circuit affirming the United States District Court for the Northern District of California's ruling appears in the Appendix hereto along with the District Court's rulings in favor of the Respondents.

STATEMENT OF JURISDICTIONAL BASIS

Title 28, U.S.C § 1254(1), provides in part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

The final judgment and memorandum of the Ninth Circuit Court of Appeals was filed on March 5, 2007. This timely petition for review follows the same.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED IN THIS CASE

The First Amendment to the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution states:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be

liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Introduction To Legal Need For Review

Discussions of faith, politics and current events are a normal and expected part of people's work lives in the United States. Employees' break-room, open bulletin board, or open e-mail system discussions are, frankly, a critical part of the dialogue about issues of the day. Indeed, a municipal employer, such as the City of Oakland, California, cannot silence specific employee views on issues of public concern, including same-sex marriage, without some showing of actual disruption in the workplace. *Connick v. Myers*, 461 U.S. 138, 151 (1983).

While it is true that municipal workplace discussions should never rise to the level of outright offense, discrimination, or actual hate-speech, one can readily accept that a discussion may be intense or even heated where sensitive topics are discussed in the workplace during break time or in a common area. However, the potential for vigorous discussion cannot be a basis for a municipality's complete ban on certain forms of speech by its employees as occurred in this case.

Contrary to the Ninth Circuit and District Court's rulings in this case, public employee discussion on issues such as a ban on same-sex marriage is not disruptive per se' to the workplace—even in the case of a municipal employer. (Appendix

pp. 19a-20a, 41a-43a). Indeed, a municipal employer's complete ban on printed or verbal speech favoring a traditional view of marriage and the family is, constitutionally speaking, unacceptable.

With the likelihood of a lively and important national debate about same-sex relationships, religion, and the future of our nation in the upcoming 2008 Presidential Election, there exist compelling reasons for granting review in this case. If review is not granted, there is an imminent likelihood that thousands of California's Bay Area employees will be chilled in the exercise of free speech rights or completely silenced during a time where friendly debate about national issues should not only be allowed but invited.

In contravention to well established First Amendment jurisprudence, the Ninth Circuit Court of Appeals has determined that the terms "natural family," "marriage," and "family values" are forms of speech that may be completely restrained by a municipal employer through a purported interest in preventing discrimination against homosexuals and other groups. (Appendix pp. 3a-4a).

Ironically, the Petitioners in this case are African-American, Christian, females who never intended on discriminating against anyone and simply wanted a fair chance to engage in the same dialogues about family, politics, and religion that other employees were allowed by the City of Oakland. As can be seen from Appendix pp. 65a-89a, taken directly from the record below, all variants of political speech were allowed in the City of Oakland's open e-mail system and employee bulletin board. Speech was allowed concerning war, healthcare, peace, employee outsourcing, sports, racism, slavery, spirituality, hate, God, the Gay-Straight Employee Alliance, tolerance, homosexuality, 'coming out,' diversity, Christ, the Bible, sexuality, and a host of other topics. The only speech banned was that of the Petitioners as found at Appendix p. 65a (referring to the "natural family," "marriage" and "family

values"). In this vein, it is noteworthy that the District Court found that the basic "facts are not in material dispute." (Appendix p. 7a).

To allow the lower court's ruling to stand, exposes every public employee to outright censorship by a municipal employer for merely mentioning words such as the "natural family," "marriage", and "family values," which relate to issues at the forefront of national debate. In fact, the lower courts' decisions could preclude public employees from so much as mentioning the birth of one's child or the fact that they were just married because this might theoretically offend a co-worker. (Appendix pp. 7a-9a).

Simply stated, the Ninth Circuit and the District Court went way too far afoul of established constitutional and common sense jurisprudence. This foray brings this case squarely within the standards justifying review under Rules of the Supreme Court of the United States, Rule 10. The marketplace of ideas has been unreasonably restricted by the actions of Respondents and they have established public policy contrary to the First Amendment. The purpose of the 'marketplace of ideas' principle is to allow the free debate of various issues of public concern. The marketplace of ideas does not allow for discrimination based on the subject matter or viewpoint of an individual's or group's speech simply because it *might* offend someone.

If allowed to stand, the integrity of this Court's essential holdings in *Pickering v. Board of Education*, 391 U.S. 563 (1968) is fundamentally altered and thousands of municipal employees will remain subject to a prior restraint on speech that could, in some vague way, be determined hate-speech regardless of context or normality. Furthermore, the Ninth Circuit's judgment conflicts with this Court's prior holdings in *Waters v. Churchill*, 511 U.S. 661 (1994) and in *Connick v. Myers*, 461 U.S. 138 (1983), which recognize protection

for a public employee's nondisruptive speech on matters of public concern.

B. Basic Statement Of Facts Justifying Review

Petitioners are employees of the City of Oakland and co-founders of Good News Employees Association (hereinafter referred to as "GNEA"), an unincorporated association of persons. Petitioners and their associates, regularly engage in prayer and other peaceful activities as part of their expressive, political, and religious activities with GNEA. Petitioners have advertised their City of Oakland employee club activities by way of a flyer.

The flyer stated nothing more than exactly the following:

> "Preserve Our Workplace With Integrity
>
> Good News Employee Association is a forum for people of Faith to express their views on the contemporary issues of the day. With respect for the Natural Family, Marriage and Family Values.
>
> If you would like to be a part of preserving integrity in the Workplace call Regina Rederford @ 238-7534 or Robin Christy @ 238-6993."

The flyer was also occasioned by the depiction of a menorah. (See Appendix p. 65a).

The flyer came about after other employee groups, including those that promote equality for homosexuals, were given free access to the e-mail system and a bulletin board of the City of Oakland for purposes of advertising political activities. (Appendix pp. 66a-89a). When Petitioners asked for the same opportunity to communicate in a like manner to their co-employees, they were denied equal accommodation by Respondents. In furtherance of the City's objectives, Petitioners' flyer was taken down and presumably destroyed by City officials.

In direct response to the peaceful activities of the Petitioners, Oakland's officials enacted a restrictive policy known as Administrative Instruction 71. The policy deems the above referenced flyer and its contents to be "homophobic" and disruptive per se'. The justification for imposition of the policy was stated as follows:

> "We have recently had incidents in our agency where staff has inappropriately posted printed materials that are in violations of AI 71. Specifically flyers were placed in public view which contained statements of a homophobic nature and were determined to promote sexual orientation based harassment. [. . .] Failure to comply with the directives in AI 71 and 140 will include disciplinary action up to and including termination."

The policy was enacted and enforced by the individual Respondents named in this lawsuit. Defendant Joyce Hicks was the Deputy Director of the Community and Economic Development Agency of the City of Oakland. Robert C. Bobb was the City Manager of Oakland at the time. Hicks answered to Mr. Bobb. Bobb expected, and Hicks admitted to, being personally responsible for enforcing an anti-discrimination policy known as City Policy No. AI71 within Petitioners' specific department. Hicks also allowed the existence of more than one employee bulletin board in her department and allowed "nondiscriminatory" content to be posted on these boards even after AI71 was enacted. Hicks was also responsible for enforcing AI71 as against bulletin board postings.

Hicks personally, while acting under color of law, took punitive action against the First Amendment rights of the Petitioners in the form of threatening Petitioners continued employment if they continued to post the subject flyer. Punitive action was not, and has never been, taken against other employees responsible for posting on bulletin boards views about Osama Bin Laden, spiritual matters, sports,

taxes, God, social events, hate (including hate against religion), terrorism and God, Christmas, slavery, fascism, communism, war, and mass murder.

The employees who actually carried out the censorship of Petitioners' speech worked for Hicks. Her subordinates' censorship was initially ratified by Hicks in January 2003. Hicks further ratified and promoted Wong's conduct on or about February 20, 2003, when she declared an intention to continue enforcement of AI71 against Petitioners and other employees in the manner she had with regard to the flyer. As applied by Hicks, AI71 unconstitutionally precludes anything that can be construed to even question the propriety of homosexuality (even unsafe practices).

Respondent, Robert C. Bobb, was the City Manager of Oakland. He was also almost exclusively responsible for the application, enforcement, and drafting of Policy AI71. Moreover, he personally, while acting under the color of law, took punitive action, through his employees (including Hicks), against Petitioners by allowing the application of AI71 against Petitioners' activities.

Respondent, Robert C. Bobb, as the City Manager, was a final policymaker for Oakland at all times relevant herein. His actions resulted in execution and interpretation of Oakland's official ordinances and policies. Bobb was personally responsible for drafting and enforcing (through his employees) Administrative Instruction No. AI71, which was applied against the activities of the Petitioners.

Respondent, Robert C. Bobb, was admittedly the only and "final policy maker" as to all administrative instructions during his tenure, including AI71. Bobb was responsible for setting policy on AI71 in 2002 and 2003, which were the relevant years. Moreover, not even the City Attorney had more authority over administrative policies than Mr. Bobb. Respondent Bobb knew that his employees did have First

Amendment rights that could be exercised in the workplace and that he could not violate their rights.

In or about March, 2002, a homosexual group of employees was given free access to the e-mail and written announcement systems of Oakland for purposes of advertising their various associational, political, and other activities. References to sexuality were permitted to be discussed in the workplace. Employees were allowed to be openly expressive about their personal sexual practices. In fact, events such as "Happy Coming Out Day" were promoted under Bobb's management. Respondent Bobb also knew that a Gay Straight Employee Alliance had been formed by his employees in 2002. During Bobb's tenure, employees were allowed to discuss just about anything they wanted except for threatening or actual violence against other employees. In fact, according to Bobb's deposition testimony, employees could actually refer to each other as "niggers" or other such derogatory terms, as a form of "workplace" speech. It's hard to believe Respondent Bobb would allow the term "nigger" to be used within the workplace but not the terms "natural family, marriage and family values."

When Petitioners later asked to be given the same opportunity to communicate with other employees about their Christian activities and views on family, they were denied equal accommodation. Respondents did so because they do not want the *expressed* Christian beliefs, practices, and activities of Petitioners to conflict with the discussion of sexual practices that other employees, including one Judith Jennings, were allowed to openly engage in during 2002-2003. (Appendix pp. 18a-20a).

Respondent Hicks was aware that double standards were being applied to employees' expressive activity in late 2002 through early 2003. Hicks also feels that it is not a violation of AI71 related policies for employees to openly use exclusionary slurs such "homophobes" against each other. More-

over, terms and slurs that knowingly exclude heterosexuals or celibate persons are ostensibly permitted to be openly used by Hicks' employees. Hicks made no attempt to accommodate views concerning homosexuality by Catholic, Muslim, Protestant or other religious adherents under her supervision. She didn't even know what the term "accommodate" was, even after 26 years as an attorney. Bobb, similarly, had no idea that religious views were a part of the City's diversity in 2002-2003. However, Bobb recognize that all employee classes (race, religion, etc.) must be treated equally in terms of First Amendment exercise in the workplace.

On or about November 18, 2002, Petitioners attempted to announce the existence and activities of GNEA to other employees of the City of Oakland. At the direction, bequest, and order of Respondent Hicks, the flyer was forcibly removed by one of her subordinates on or about January 3, 2003, from the employee bulletin board of the department that Petitioners work in and other locations. Respondents admit that the flyer was caused to be taken down because of its content (i.e. its words and meaning to the reader).

Petitioners had not caused a workplace disruption by their activities. Moreover, Respondent Bobb was unaware of any instance where expression of religious beliefs or views on gay marriage ever interfered with City operations. While actual discrimination can be prevented under AI71, there is absolutely no evidence that the flyer or Petitioners 'treated anyone differently' in advising as to the nature of the club or contact information. Hicks defines "discrimination," within the meaning of AI71, as requiring prejudicial treatment of a class of persons. Petitioners were not given, nor was there in place, a formal internal appeals process that would have allowed a challenge to the decision to censor the flyer. Moreover, Respondents' disparaging and vitriolic characterization of Robin Christy and Regina Rederford is reprehensible. At no

time have either of these long-term employees ever been hateful toward homosexuals.

In early 2003, Respondents, while acting under color of law, developed, implemented, enforced, and instituted AI71. AI71 did not exist at the time that Petitioners originally posted their flyer (i.e., 11/03). The policy is presently being unequally enforced and was a direct and discriminatory response against the First Amendment activities of Petitioners. Respondents have not attempted to similarly silence any other group of employees, although homosexual advocacy groups and other advocacy groups exist at Respondents' offices and are given free reign to discuss and promote their agendas and views, short of actual violence and discrimination within the workplace. (Appendix pp. 80a-81a).

In fact, Judith Jennings, the sole complaining co-worker in this case initially desired to attend Petitioners' meetings, thus demonstrating no actual disruption or threat of disruption being caused by the posting of the flyer. Moreover, Respondents apparently took no action against other employees who made derogatory comments about the Bible during this same time period (which was prohibited according to Bobb), yet, at the same time, Bobb found Petitioners' flyer to contain a "certain religious ideal," thereby making "her [petitioner] subject to discipline . . ." Respondents took down the flyer because of its "editorial comment."

ARGUMENT FOR REVIEW

I. RESPONDENTS' ACTIONS CONSTITUTED A VIOLATION OF PETITIONERS' CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT TO FREE SPEECH: REVIEW IS NECESSARY TO REESTABLISH THE RIGHT OF THOUSANDS OF EMPLOYEES TO SPEAK PEACEFULLY ON ISSUES OF PUBLIC CONCERN

As the Ninth Circuit Court of Appeals correctly pointed out, qualified immunity protects Respondents unless the court

determines that Petitioners "have shown that the action complained of constituted a violation of their constitutional rights," "the violated right was clearly established, and . . . a reasonable public official could not have believed that the particular conduct at issue was lawful." *Butler v. Elle*, 281 F.3d 1014, 1021 (9th Cir. 2002) (citing *Sonada v. Cabrera*, 255 F.3d 1035, 1040 (9th Cir. 2001). The Ninth Circuit Court of Appeals found that Petitioners were unable to satisfy these three (3) criteria in order to abrogate Respondents' qualified immunity. (Appendix B at pp. 3a-5a).

Indeed, the Ninth Circuit approved the actions of Respondents in taking down Petitioners' flyer because the words "natural family, marriage, and family values" were somehow disruptive to the efficient order of their workplace and/or might offend another co-worker does not serve a "legitimate administrative interest." This decision was made even though Respondents allowed various others groups and individuals to post their views and opinions about other hot issues of the day on the bulletin board. Not only were views about Osama Bin Laden, spiritual matters, sports, taxes, God, social events, hate (including hate against religion), terrorism and God, Christmas, slavery, fascism, communism, war, and mass murder allowed free access to the employee bulletin board, but, according to the record below, Respondents actively allowed the use of derogatory terms within the workplace, including, but not limited to, the term "nigger." It's difficult to believe the terms "natural family, marriage, and family values" would be offensive to a municipal employer and deemed likely to disrupt the efficient order of the workplace when various derogatory terms, including the term "nigger," were used and implicitly endorsed under Respondents' authority.

The "legitimate administrative interests" of Respondents do not outweigh Petitioners' interest in their constitutional right to freedom of speech. The alleged actual disruption in

this case amounted to nothing more than one complaint by one lesbian co-worker, Judith Jennings, whose subjective private beliefs in the meaning of the words "natural family, marriage and family values" caused Petitioners' flyer to be taken down by Respondents.

Looking at the words actually uttered in the Petitioners' flyer, without taking into consideration the misrepresented private beliefs of the complainant or the Respondents, there is no reference to sexual orientation, homosexuality, or any other words which discriminate, harass and/or might offend a particular "protected class." In fact the Ninth Circuit Court of Appeals erred in diving into the private beliefs of the complainant and Respondents in determining how the words "natural family, marriage and family values" affected the complainant and Respondents' workplace. *Pool v. Vanrheen* 297 F.3d 899, 906 (9th Cir. 2002) and *Pickering v. Board of Education*, 391 U.S. 563 (1968) require that a court only look at the speech as actually uttered, not the private beliefs of the speakers. The speech as actually uttered by Petitioners in their flyer is no more "offensive" than the term "nigger" which was allowed to be used within the workplace under Respondents' authority. It is only the Respondents' own restrictive connotation of the language that gives rise to the automatic assumption that it is somehow hate speech. The Ninth Circuit affirmation of such reasoning creates a dangerous precedent and a deviation from constitutional norms.

Although the only limit placed on Petitioners' right to freedom of speech was the removal of a single flyer from the bulletin board with a concomitant threat of termination for future use of 'offensive' words, the decision by Respondents did in fact violate the constitutional rights of Petitioners. Respondents did not, nor could a similarly situated municipal employer, show that the words "natural family, marriage and family values" were likely to bring about grave and imme-

diate danger to the workplace and/or disrupt the operations of a city. Prior restraint is not justified.

The Ninth Circuit's description of Petitioners' speech interest as "vanishingly small," especially when the issue of same-sex marriage and homosexual rights are heated political topics at the forefront of national debate, undermines the foundation and purpose of the First Amendment. Political speech is "given the maximum level of protection by the Free Speech Clause because it lies at the core of the First Amendment." *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 224 F.3d 1007, 1019 (9th Cir. 2001). If the use of a flyer is what the Ninth Circuit considered to be a "small" interest, one should not forget that many of this Court's seminal rulings come from the distribution of a flyer, standing on a soapbox, wearing a t-shirt, carrying a picket sign, or other simple forms of expression. The Ninth Circuit has seemingly forgotten that the substance of political speech is rarely a "vanishingly small" interest insofar as the Constitution is concerned.

The issues to be discussed in the GNEA are matters of public concern, just as same-sex marriage and homosexual rights are matters of public concern. By allowing an unchilled discussion and/or debate over the meaning of the terms "natural family, marriage and family values" and the social impact these terms have on society versus the impact the homosexual rights movement has on society, actually aligns with the original intent of the founding fathers as it pertains to the First Amendment.

To find that Respondents had a more substantial interest in maintaining the efficient operation of their office than Petitioners had in their speech, requires a showing that Petitioners' flyer discriminated against a "protected class," constituted hate speech, and/or disrupted the workplace in some way. It is a far stretch of the imagination to conclude the words "natural family, marriage and family values"

discriminate against homosexuals, constitute hate speech towards homosexuals, and/or will disrupt the workplace and interfere with the efficient operation of the workplace in some way. None of these terms can be construed to be inflammatory towards homosexuals nor directly condemning them and/or their lifestyle. The alleged "homophobic" nature of Petitioners' flyer was conjured up by the Respondents' subjective belief in what they thought the terms "natural family, marriage and family values" meant.

The actions of Respondents continue to violate the constitutional rights of Petitioners and establish bad public policy in violation of prior rulings by this Court and the spirit of the First Amendment. The right to free speech is a constitutional right that is clearly established and is one of the most highly protected and cherished constitutional rights afforded to all American citizens. Respondents knew that their employees, including Petitioners, did have First Amendment rights that could be exercised in the workplace and that could not be violated absent actual violence and/or discrimination. A reasonable public official could not have believed that the particular conduct engaged in by Respondents was lawful, especially when Respondents allowed derogatory terms to be used throughout the workplace and allowed various other expressive views and opinions by other employees to be freely placed on the employee bulletin board with no threat of disciplinary action.

The only discrimination that exists is the Respondents' own stated desire to regulate those views and opinions which they believe do not conform with their subjective beliefs. If anything, Respondents have created a hostile work environment by discriminating against Petitioners and their beliefs in the "natural family, marriage and family values." This Court should not allow such censorship to stand.

II. STRICT SCRUTINY SHOULD HAVE BEEN USED TO DETERMINE THE CONSTITUTIONALITY OF RESPONDENTS' ACTIONS

Although *Pickering* is the leading authority on the government's power to regulate public employees' speech, Respondents cannot show that the interest in maintaining the efficient operation of their workplace outweighs the Petitioners' right to engage in the debate over homosexual rights versus those of the "natural family, marriage and family values." Supporting this argument is the fact that Respondents allowed access to the employee bulletin board to employees and groups who expressed views about Osama Bin Laden, spiritual matters, sports, taxes, God, social events, hate (including hate against religion), terrorism and God, Christmas, slavery, fascism, communism, war, and mass murder, views which clearly have the potential of disrupting the Respondents' workplace even more than the terms "natural family, marriage and family values."

Respondents refused to accommodate the religious views and speech rights of Petitioners yet fully accommodated other groups, including those who were actively against Petitioners' beliefs in traditional family values, values that have sustained this Country for hundreds of years. Respondents opened up a limited public forum when they allowed all employees to post political, religious, and social views on an employee bulletin board and e-mail system. As this Court has established, when a non-traditional forum is intentionally opened for public discourse, which the bulletin board at issue in this case was, it creates a designated public forum and restrictions on speech are analyzed with the same strict scrutiny as a traditional public forum. As such, regulations on speech must be viewpoint neutral and reasonable in light of the purpose served by the forum. *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829.

Based on the various flyers and materials which were allowed free access to the employee bulletin board, it appears the purpose served by the bulletin board and e-mail system was to open up a forum whereby City employees could express their views and opinions on various issues of the day. (Appendix pp. 65a-89a). The actions of Respondents in taking down the flyer posted by Petitioners were neither viewpoint neutral nor reasonable given the numerous other flyers which were allowed to remain; flyers which expressed views pertaining to war, religion, social events, hate and other hot issues of the day.

Respondents' actions do amount to viewpoint discrimination. Therefore, strict scrutiny must be applied in determining the constitutionality of Respondents' actions. As such, Respondents must demonstrate a compelling state interest which is narrowly tailored to justify their decision to take down Petitioners' flyer. A compelling state interest cannot be shown when Respondents encouraged the use of derogatory terms within the workplace, terms which any reasonable person would be offended by, and allowed numerous other flyers to be posted on the bulletin board without the threat of disciplinary action. The decision to take down Petitioners' flyer because their message contained the innocuous terms "natural family, marriage, and family values" was the result of one complaining party and Respondents' subjective belief that these terms were not appropriate within the workplace.

Even if "forum analysis" is not appropriate in this case because of the governmental employer/employee relationship that existed, under *Pickering*, Petitioners' speech rights would still be protected as it pertains to a matter of public concern and Respondents cannot demonstrate that these terms would have any more of an impact on the efficient order of the workplace than the term "nigger" would. Respondents' actions in taking down Petitioners' flyer was the direct result of

the content of Petitioners' speech and therefore strict scrutiny must be applied.

III. THE NINTH CIRCUIT COURT OF APPEALS' DECISION GIVES GOVERNMENT EMPLOYERS UNBRIDLED DISCRETION TO REGULATE THE FREE SPEECH RIGHTS OF EMPLOYEES

To allow the Ninth Circuit Court of Appeal decision to stand, dangerously opens the door to precluding any mention of traditional family values, religion and/or disapproval of the homosexual lifestyle within the workplace. The marketplace of ideas principle cannot tolerate this unbridled prior restraint given to government employers in determining which employees speech is acceptable and which is not.

The Constitution demands equal protection of its laws to all individuals without favoritism towards one group or individual versus another. Respondents denied Petitioners equal protection of the law when they chose to favor one individual or group's views over that of Petitioners. Respondents opened up a forum whereby employees could express their views and opinions on various issues of the day. Under most circumstances, one has the right to believe and profess whatever religious doctrine one desires and great protection is afforded to this element of the Constitution. *See generally, Good News Club v. Milford Cen. School*, 533 U.S. 98 121 S.Ct. 2093 (2001); *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269 (1981).

Given the extreme consequences the Ninth Circuit Court of Appeals' decision will have on public employees' constitutional right to free speech, Petitioner respectfully prays for review in this case.

CONCLUSION

Based on the foregoing, review must be granted in this case in order to remedy the clear violation of Petitioners' free speech rights.

Respectfully submitted,

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June 4, 2007

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed 03/05/07]

No. 05-15467
D.C. No. CV-03-03542-VRW

GOOD NEWS EMPLOYEE ASSOCIATION; *et al.*,
Plaintiffs-Appellants,

v.

JOYCE M. HICKS, in her individual and official capacities, as Deputy Executive Director of the Community & a Economic Development Agency; et al.,
Defendants-Appellees.

JUDGMENT

Appeal from the United States District Court for the Northern District of California (San Francisco).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed MAR 5, 2007]

No. 05-15467
D.C. No. CV-03-03542-VRW

GOOD NEWS EMPLOYEE ASSOCIATION; REGINA REDERFORD; ROBIN CHRISTY,
Plaintiffs-Appellants,

v.

JOYCE M. HICKS, in her individual and official capacities, as Deputy Executive Director of the Community & Economic Development Agency of the City of Oakland; ROBERT C. BOBB, in his individual and official capacities, as the City Manager of the City of Oakland,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Argued and Submitted February 15, 2007
Stanford, California

MEMORANDUM *

Before: B. FLETCHER, CLIFTON, and IKUTA, *Circuit Judges*.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appellants challenge two decisions made by the district court. In the initial decision, the district court granted, in part, appellees' motion to dismiss several of the claims raised by appellants. Then, following discovery, the district court granted summary judgment to appellees on each of the remaining claims. We agree with the well-reasoned orders of the district court and affirm.

Appellants raise three arguments on appeal. First, they assert that the district court misapplied the law pertaining to workplace speech—particularly, *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), and *Pool v. VanRheen*, 297 F.3d 899 (9th Cir. 2002)—in granting summary judgment to appellees. Second, appellants argue that if the district court had applied *Pickering* correctly, it would not have dismissed five other causes of action lodged in their complaint. And third, appellants argue that the administrative instruction at issue in this appeal is unconstitutionally vague and overbroad.

Appellants' first argument lacks merit. To win on appeal, appellants must demonstrate that appellees' qualified immunity has been abrogated. Qualified immunity protects appellees unless the court determines that appellants "ha[ve] shown that the action complained of constituted a violation of [their] constitutional rights," "the violated right was clearly established, and . . . a reasonable public official could [not] have believed that the particular conduct at issue was lawful." *Butler v. Elle*, 281 F.3d 1014, 1021 (9th Cir. 2002) (citing *Sonada v. Cabrera*, 255 F.3d 1035, 1040 (9th Cir. 2001)). Here, appellants fail at the first stage of the inquiry.

Public employers are permitted to curtail employee speech as long as their "'legitimate administrative interests' outweigh the employee's interest in freedom of speech." *Pool*, 297 F.3d at 906 (quoting *Bauer v. Sampson*, 261 F.3d 775, 784 (9th Cir. 2001)). In this case, the only limit placed on appellants' speech was the removal of a single flyer from the wall. Although appellants did receive an oral warning for

posting the flyer, no adverse employment action was taken, and the warning alone is insufficient to tip the *Pickering* balance in appellants' favor. Appellants were also allowed to submit a new flyer, subject to certain editorial constraints. In light of the minimal interference with appellants' free speech rights, the district court appropriately described their speech interest as "vanishingly small." *Good News Employee Ass'n v. Hicks*, No. C-03-3542 VRW, 2005 WL 351743, at *9 (N.D. Cal. Feb. 14, 2005). Because the district court correctly held that appellees had a more substantial interest in maintaining the efficient operation of their office than appellants had in their speech, appellants cannot establish a viable free speech claim.

Even if appellants presented an arguably cognizable claim —which they did not—they would still need to show that the *Pickering* balancing test yielded a "clearly established" violation. The determination of "whether a public employee's speech is constitutionally protected turns on a context-intensive, case-by-case balancing analysis . . . [that] the law regarding such claims will rarely, if ever, be sufficiently 'clearly established' to preclude qualified immunity. . . ." *Moran v. Washington*, 147 F.3d 839, 847 (9th Cir. 1998). Appellants fail to show such a 'clearly established' violation here.

Appellants' second argument must also fail. Although appellants argue that the district court's misapplication of *Pickering* caused it to dismiss five additional causes of action, the district court actually dismissed these counts on entirely separate, unrelated grounds. *See Good News Employee Ass'n v. Hicks*, No. C-03-3542 VRW, slip op. at 34-45 (N.D. Cal. Mar. 16, 2004). Appellants fail to address any of the actual grounds for dismissal, either directly or indirectly, and have provided no additional arguments that bear on their claims. We therefore deem appellants' argument waived. *See Officers for Justice v. Civil Serv. Comm'n*, 979 F.2d 721, 726 (9th Cir.

1992), *cert denied*, 507 U.S. 1004 (1993) (holding that issues not "specifically and distinctly raised and argued" in opening briefs need not be considered by the court).

Appellants' third argument is also without merit. Appellants allege that Administrative Instruction 71 ("AI 71") is unconstitutionally vague and overbroad, but have provided little to support their claim. This court has recognized that "even when a law implicates First Amendment rights, the constitution must tolerate a certain amount of vagueness." *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1151 (9th Cir. 2001). The essential question before any reviewing court is whether individuals who want to obey the statute would have difficulty understanding it. *Kannisto v. City & County of San Francisco*, 541 F.2d 841, 845 (9th Cir. 1976). AI 71 prohibits "discrimination and/or harassment based on sexual orientation." It then provides an entire paragraph of examples to illustrate the reach of these terms. Between the plain terms of the instruction and the illustrative examples, city employees should have little difficulty understanding the scope of the prohibition. To the extent that any vagueness exists, such vagueness is an inherent, irreducible part of any anti-discrimination ordinance and does not reach a "real and substantial" amount of speech. *See Tucker v. Cal. Dept. of Educ.*, 97 F.3d 1204, 1217 (9th Cir. 1996). AI 71 does not run afoul of the First Amendment, and the district court did not err in dismissing appellants' vagueness and overbreadth challenge.

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No C-03-3542 VRW

GOOD NEWS EMPLOYEE ASSOCIATION *et al*,
Plaintiffs,

v.

JOYCE M HICKS *et al*,
Defendants.

ORDER

Before the court is defendants' motion for summary judgment. Doc #40. For the reasons that follow, the court GRANTS defendants' motion, thus adjudicating plaintiffs' claims for retrospective relief. The court *sua sponte* dismisses plaintiff's claims for prospective relief for lack of jurisdiction.

I

Plaintiffs Regina Rederford ("Rederford") and Robin Christy ("Christy") bring suit pursuant to 42 USC § 1983 and other statutes for violations of various putative rights in the course of the removal of a flyer they had posted around their office in the Oakland Community and Economic Development Agency (CEDA). The flyer, which promoted their unincorporated association, the Good News Employee Association (GNEA), called on readers to "Preserve Our Workplace With Integrity," and explained that GNEA "is a forum for people of Faith to express their views on contemporary issues of the day. With respect for the Natural Family, Marriage and Family values." Melaugh Decl (Doc #43) Ex D. Plaintiffs contend in their complaint (Doc #1) that the removal of this

flyer violated their rights under the United States Constitution, the California Constitution and municipal law.

Named as defendants are Joyce Hicks ("Hicks"), who was a deputy executive director in CEDA, Robert Bobb ("Bobb"), who was Oakland's City Manager, and the City of Oakland (the "City") itself. Defendants filed a motion pursuant to FRCP 12(b)(6) to dismiss plaintiff's complaint for failure to state a claim (Doc #13) and a motion pursuant to FRCP 41(b) to dismiss the case for failure to prosecute (Doc #25). By order dated March 16, 2004, the court granted both motions in part. Doc #32. Remaining in the case is a claim against Hicks and Bobb, in both their individual and official capacities, for violation of plaintiffs' right to freedom of speech under the First Amendment to the United States Constitution. Plaintiffs seek both retrospective and prospective relief. Defendants now move for summary judgment. Doc #40.

The facts are not in material dispute. GNEA's stated purposes are "[t]o celebrate our Faith and Liberties by preserving the integrity of the Natural Family, Marriage and Family values"; "[t]o provide a forum for people of faith to express their views on contemporary issues of the day"; and "[t]o oppose all views that seek to redefine the Natural Family and Marriage." Melaugh Decl (Doc #43) Ex D. In its "Statement of Faith," GNEA explains that "we believe the Natural Family is defined as a man and a women their children by birth or adoption, or the surviving remnant thereof (including single parents)"; that "[w]e believe Marriage is defined by a union between a man and a woman according to California state law"; and that "[w]e believe in Family Values that promote abstinence, marriage, fidelity in marriage and devotion to our children." *Id.* Plaintiffs' deposition testimony confirms the anti-homosexual import of their definitions of "natural family," "marriage" and the meaning of the flyer's exhortation to "preserve our workplace with integrity." *See, e.g.*, Melaugh Decl (Doc #43) Ex A (Reder-

ford Depo) at 8:8-22, 9:3-6, 37:1-41:1, 48:25-49:10, 135:22-136:13, 146:22-147:6, 194:1-4; id Ex C (Christy Depo) at 19:1-19, 24:14-21, 38:2-18.

The flyer came to the attention of Judith Jennings ("Jennings"), a lesbian employee in CEDA who used the copy machine near which the flyer was posted. Jennings Decl (Doc #41) ¶ 6; Melaugh Decl (Doc #43) Ex A (Rederford Depo) at 130:21-131:6. Jennings felt "targeted" and "excluded." Jennings Decl (Doc #41) ¶ 7. Shortly after seeing the flyer, Jennings spoke with Rederford, whose name and phone number (along with Christy's) appeared on the flyer. *Id* ¶ 8. This conversation left Jennings "feeling anxious about working in the same office as [plaintiffs]" and she "could not believe that [she] worked with someone who condemned homosexuals like [her] so much." *Id* ¶ 9. Jennings and Rederford worked near one another and spoke with some frequency. *Id* ¶¶ 3, 8, 11; Melaugh Decl (Doc #43) Ex A (Rederford Depo) at 75:15-25. After the conversation, Jennings was "scared," did not talk to Rederford any more and their "relationship really changed." *Id* at 78:8-17, 130:24-131:6; Jennings Decl (Doc #41) ¶ 9. Jennings decided to complain to the city attorney's office. *Id* ¶ 10. She complained not only about the flyer, but also about earlier episodes of distribution of anti-homosexual materials, at least one of which involved plaintiffs. *Id* ¶¶ 4-5.

Jennings' complaint was investigated by Joanne Braddock ("Braddock"), who was the administrative services manager in CEDA, and Calvin Wong ("Wong"), who was the director of building services in CEDA. Braddock Decl (Doc #4) ¶¶ 2-3. They interviewed Jennings, who seemed "upset and distraught" and "visibly nervous and shaken," *id* ¶ 3, and Braddock discovered the flyer posted in several locations other than near the copier, *id* ¶ 4. "After the investigation was complete, [Braddock] received an order from the City Attorney's office to take the * * * flyer down. The Plaintiffs'

flyer violated AI 71." *Id* ¶ 5. "AI 71" is an abbreviation for "Administrative Instruction 71," a personnel policy promulgated by the City Manager of Oakland, entitled "Equal Employment Opportunity/Anti-Discrimination/Non-Harassment Policy and Complaint Procedure." Lively Decl (Doc #52) Ex 1.13.

Plaintiffs acknowledge that they have alternative channels open to them to communicate their message. For example, Rederford acknowledges that she was not restricted from expressing her views on marriage or gay rights outside the workplace, over lunch or on a break. Melaugh Decl (Doc #43) Ex A (Rederford Depo) at 141:5-18. Nor were plaintiffs prohibited from organizing GNEA, and Rederford acknowledges that she was told "she could announce [her] group" through the City's e-mail system if she removed "verbiage that could be offensive to gay people" from her announcement. Id at 141:19-142:21. See also Melaugh Decl (Doc #43) Ex C (Christy Depo) at 27:10-21.

Defendants' roles in the removal of the flyer were minmal. Bobb, as City Manager, was the final authority responsible for approving administrative instructions, including AI 71. Melaugh Decl (Doc #43) Ex E (Bobb Depo) at 10:5-20. Bobb does not know and has never met plaintiffs. *Id* Ex A (Rederford Depo) at 72:24-25; *id* Ex C (Christy Depo) at 26:18-19; *id* Ex E (Bobb Depo) at 14:9-16. There is no evidence that Bobb participated in removal of the flyer.

Hicks may have spoken once to Rederford in casual conversation; she does not know Christy and Christy does not know her. *Id* Ex A (Rederford Depo) at 71:6-72:2; *id* Ex C (Christy Depo) at 26:22-23; *id* Ex F (Hicks Depo) at 8:20-25. Hicks believes that Wong ordered that the flyer be taken down, *id* at 35:8-25; Hicks does not recall that she ordered that the flyer be taken down, *id* at 36:1-2; and plaintiffs provide no evidence to contradict this account. Indeed, it appears that the flyer was removed on January 3, 2003, and

Hicks, who was on vacation at the time, did not return to the office until Monday, January 6, 2003. *Id* at 168:21-169:5. Although as a matter of heirarchy, Braddock and Wong reported to Hicks, who in turn reported to Bobb, there is no evidence that Bobb or Hicks directed or influenced Braddock's, Wong's or the City Attorney's actions or decisions with respect to taking the flyer down.

There were some conversations following removal of the flyer, but there is no evidence of any formal appeal by plaintiffs of Braddock and Wong's removal of the flyer. Hicks participated in a January 17, 2003, meeting (along with a representative from the city attorney's office) to discuss Jennings' feelings of harassment due to her sexual orientation, but Hicks declined to discuss at her deposition the contents of that meeting on the ground of attorney-client privilege, and plaintiffs have not interposed a formal objection to that claim of privilege. Hicks also discussed the flyer "with regard to Administrative Instruction 71" with Wong "[s]ometime in January of 2003." In late February 2003, Hicks transmitted a copy of AI 71 to all CEDA employees accompanied by a memorandum that described "recent[] * * * incidents" where "flyers were placed in public view which contained statements of a homophobic nature and were determined to promote sexual orientation based harassment," and noted that violation of AI 71 could result in "discipline up to and including termination." Compl (Doc #1) Ex 1; Melaugh Decl (Doc #43) Ex F (Hicks Depo) at 59-63 (discussing memo).

II

In reviewing a summary judgment motion, the court must determine whether genuine issues of material fact exist, resolving any doubt in favor of the party opposing the motion. "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving

party." *Anderson v Liberty Lobby*, 477 US 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* And the burden of establishing the absence of a genuine issue of material fact lies with the moving party. *Celotex Corp v Catrett*, 477 US 317, 322-23 (1986). When the moving party has the burden of proof on an issue, the party's showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party. *Calderone v United States*, 799 F2d 254, 258-59 (6th Cir 1986). Summary judgment is granted only if the moving party is entitled to judgment as a matter of law. FRCP 56(c).

The nonmoving party may not simply rely on the pleadings, however, but must produce significant probative evidence supporting its claim that a genuine issue of material fact exists. *TW Elec Sery v Pacific Elec Contractors Ass'n*, 809 F2d 626, 630 (9th Cir 1987). The evidence presented by the nonmoving party "is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 US at 255. "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id* at 249.

The evidence presented by both parties must be admissible. FRCP 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *Thornhill Publishing Co, Inc v GTE Corp*, 594 F2d 730, 738 (9th Cir 1979). Hearsay statements found in affidavits are inadmissible. *Japan Telecom, Inc v Japan Telecom America Inc*, 287 F3d 866, 875 nl (9th Cir 2004).

III

Plaintiffs' complaint prays specifically for prospective declaratory and injunctive relief; it does not specifically seek

damages. But the court assumes that plaintiffs also seek retrospective relief, for they seek a declaration "that the actions of Defendants in refusing to grant Plaintiffs the right to * * * inform * * * on private employee time are invalid and unconstitutional," Compl (Doc #1) at 12, and a major heading in their opposition to defendants' motion for summary judgment is "defendants are not immune from damages in this case." Pls Opp (Doc #46) at 17:2. Accordingly, the court will consider whether retrospective relief is available as against the named defendants. Defendants are named in both their individual and official capacities. As this distinction is significant for awards of retrospective relief, the court will consider individual capacity liability first and then turn to official capacity liability.

A

"Government officials sued in their individual capacities under § 1983 may raise the affirmative defense of qualified immunity * * *. Qualified immunity generally protects government officials in the course of performing the discretionary duties of their offices." *Butler v Elle*, 281 Fad 1014, 1021 (9th Cir 2002) (citing *Harlow v Fitzgerald*, 457 US 800, 818 (1982)). The question of qualified immunity is a question of law to be determined by the trial court. *Siegert v Gilley*, 500 US 226 (1991). "The first step in evaluating a qualified immunity defense is to determine whether the plaintiff has shown that the action complained of constituted a violation of his or her constitutional rights." *Butler*, 281 F3d at 1021 (citing *Sonoda v Cabrera*, 255 F3d 1035, 1040 (9th Cir 2001)). If the court is satisfied that a constitutional violation occurred, "the second step is to determine: (1) whether the violated right was clearly established, and (2) whether a reasonable public official could have believed that the particular conduct at issue was lawful." *Id.*

The court need not reach the second prong of the qualified immunity inquiry because, even assuming that *someone* vio-

lated plaintiffs' First Amendment rights, Hicks and Bobb—the only named defendants in this suit—are not responsible for such a violation. Supervisory officials are not liable under 42 USC § 1983 for the actions of subordinates under any theory of vicarious liability. *Hansen v Black*, 885 F2d 642, 645-46 (9th Cir 1989) (citing *Pembauer v City of Cincinnati*, 475 US 469, 479 (1986)). "A supervisor may be liable if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Id* (citing *Thompkins v Belt*, 828 F2d 298, 303-04 (5th Cir 1987). The former option is foreclosed because plaintiffs have come forward with no evidence establishing the personal involvement of Hicks or Bobb in the removal of the flyer. The latter option is the appropriate inquiry in an official capacity suit, and to this the court now turns.

B

As the *Hansen* court explained:

> Supervisory liability exists even without overt personal participation in the offensive act if the supervisory officials implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation.

Id (citing *Thompkins*, 828 F2d at 304) (internal quotation marks omitted). It is primarily on this "policymaker" theory of liability that plaintiffs rest their case. A suit against Hicks and Bobb in their official capacities as policymakers (which the court accepts that they are for purposes of this motion) is in effect a suit against the City, the municipality for which they make policy. See *Hawaii v Gordon*, 373 US 57, 58 (1963).

In the seminal case establishing municipal liability under § 1983, the Supreme Court explained "it is when execution

of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell v Dep't of Social Services*, 436 US 658, 694 (1978). Though plaintiffs attempt artfully to argue around the rule that § 1983 does not recognize the common law tort doctrine of *respondeat superior*, see Pls Opp (Doc #46) at 18-20, the Supreme Court has repeatedly held that Monell "rejected the use of the doctrine of *respondeat superior*." *City of Saint Louis v Praprotnik*, 485 US 112, 121 (1988).

Following *Monell*, the concept of policymaker liability was refined somewhat, and the court should at this point distinguish between two flavors of policymaker liability. There are, on the one hand, policies that are developed ex ante, approved by the lawmaking or other policymaking authority, and then applied prospectively. *See, e.g., Monell*, 436 US at 660-61 ("The gravamen of the complaint was that the Board and the Department had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons."). On the other hand, there are suits in which the defendant, in his capacity as policymaker, has made a one-time decision—as, for example, when a plaintiff has sought redress through an appeal, which terminates with the policymaker's decision, cf *Praprotnik*, 485 US 112, 127 ("[W]hen a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies."), or when the policymaker made some other decision tailored to plaintiff's situation, *see, e.g., Pembauer*, 475 US at 476-77 (rejecting a court of appeals decision that a "single, discrete decision" made by a prosecutor and sheriff "on * * * one occasion" was insufficient to establish official capacity liability).

This distinction is significant, because plaintiffs cannot rest their case on the *Pembauer* and *Praprotnik* line of cases: Bobb and Hicks had no involvement at the time of the flyer's removal, nor is there evidence that they later, at plaintiffs' urging, reviewed and approved the propriety of removing the flyer. The only policymaking action plaintiffs can point to is the promulgation of AI 71 as prospective policymaking. As a threshold matter, the court observes that Hicks does not seem to have had the authority to make policy like AI 71, and accordingly cannot be held liable as a policymaker. See *Praprotnik*, 485 US 139-40 (citing *Pembauer*, 475 US 481-83) (discussing a hypothetical official who is a policymaker with respect to some matters and not others). But the court will assume, arguendo, that Hicks and Bobb are both properly regarded as policymakers with respect to the promulgation of AI 71.

As the *Hansen* court explained, for a policy to be a violation of a plaintiff's constutional rights, it must be "so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation." 885 F2d at 646 (quoting *Thompkins*, 828 F2d at 304). This requirement was announced even in *Monell*, which noted that in that case "official policy" had been established "as the moving force of the constitutional violation." 436 US at 694. The Ninth Circuit has explained that "to be a moving force behind [an] injury, * * * the identified deficiency in the [policy must be] closely related to the ultimate injury. The plaintiff's burden is to establish that the injury would have been avoided" had the policy been different. *Gibson v County of Washoe*, 290 Fad 1175, 1196 (9th Cir 2002) (internal quotation marks and citations omitted). This question of causation is a matter for the jury, *see id*, and may not be well-suited to resolution on summary judgment. Accordingly, the court will assume (for purposes of this motion only) that AI 71 bears the required nexus to the violation plaintiffs claim.

The question, then, is whether plaintiffs' rights were in fact violated. As the court discussed at length in its order on defendants' motion to dismiss, Doc #32, this is a case about speech by a government employee, and accordingly, it is controlled by *Pickering v Board of Education*, 391 US 563 (1968), and its progeny. The court assumes familiarity with its prior order and the law discussed therein. The court concluded that the speech in question—i.e., the message of the flyer—touches on a matter of public concern and was a substantial or motivating factor in the removal of the flyer. 3/16/04 Order at 20:16-22:18. Defendants do not dispute those conclusions and the court sees no reason to revisit them.

The court next concluded that the remaining issue in the Pickering test—"whether defendants have [shown] that their interests as employers outweigh plaintiffs' interests in making the speech"—was "close," but, recognizing that the question was presented in the context of a motion to dismiss, "agree[d] with plaintiffs that defendants have not met their burden, at least at this stage of the proceedings." Id at 22:19-23:2. Now that the case has progressed to summary judgment, the court may undertake a better-informed analysis of this question of law. The court set out the legal standard in some detail in its prior order:

> [Employee] speech [on a matter of public concern] must be analyzed by "the *Pickering* balance [, which] requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." [*Connick v Myers*, 461 US 138, 151 (1938)]. The Court, quoting Justice Powell's separate opinion in *Arnett v Kennedy*, 416 US 134, 168 (1974), stated that:
>
> > [T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders

> efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

Connick, 461 US at 151. In evaluating the government's interest in preventing workplace disruption, the Court considered the impairment of "close working relationships," the "manner, time, and place in which [the message] is delivered" and whether the employee's speech "arises from an employment dispute concerning the * * * application of [office] policy to the speaker * * *." *Id* at 151-53. The Court also emphasized that the government employer did not need "to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." Id at 152. Taking these factors into consideration, the Court concluded that Myers' interest in being able to ask the question regarding political pressure was outweighed by the government's considerable interest in proscribing behavior that "would disrupt the office, undermine [its] authority, and destroy close working relationships." *Id* at 154.

Subsequently, the Ninth Circuit has interpreted *Pickering* and *Connick* to require the governmental employee to show that: (1) her speech was on a matter of public concern and thus was constitutionally protected; and (2) that the speech in question was a "substantial or motivating factor" for the adverse employment action. *Pool v Vanrheen*, 297 F3d 899, 906 (9th Cir 2002). If the employee fails to demonstrate that the speech addresses a matter of public concern, then the claim should be dismissed without further inquiry. See *Moran v State of Washington*, 147 F3d 839, 846 (9th Cir 1998). Should the employee make the first two showings, the employer

> then must show that its "legitimate administrative interests" in promoting workplace efficiency outweigh the employee's interest in freedom of speech. *Pool*, 297 F3d at 906. The inquiry into the protected status of speech is one of law, not of fact. *Id.*

3/16/04 Order at 18:14-19:28 (some alterations in original).

On plaintiffs' side of the balance is their interest in speaking. This interest is slight, as the restriction placed on their speech under the facts at bar was quite limited: Plaintiffs were prohibited from posting a particular flyer on an office bulletin board. Plaintiffs themselves acknowledge that no restriction has been placed on their speech outside of work (by, for example, threatening them with termination if they speak outside the workplace). They further acknowledge that they can discuss their views with co-workers as they wish at appropriate times (at lunch, on a break).

Plaintiffs further acknowledge that they were told they would be permitted to broadcast the existence of their group, subject to certain editorial restrictions. There are in addition a wide variety of alternative channels available to plaintiffs, and defendants' policy appears to be the sort of "manner, time and place" limitation that the Court implicitly approved in *Connick*, 461 US at 152.

Plaintiffs press the argument that their speech was chilled by Hicks' circulation to all CEDA employees in late February of AI 71 and a memo reminding them that noncompliance could result in discipline. This, however, does not amount to an adverse employment action and would be germane only to the question of prospective relief. Accordingly, the court finds that, for purposes of retrospective relief, plaintiffs have a limited interest in the suppressed speech.

Defendants' countervailing interest is also modest. As the court's recitation of the law makes clear, workplace disruption is the touchstone of the employer's interest in the *Pick-*

ering balance. Here, there is no dispute that Rederford and Christy's co-worker Jennings was disturbed by the flyer, nor is there dispute that removal of the flyer was the direct result of the investigation of Jennings' complaint. But whether the particular sensitivity of a single coworker amounts to cognizable workplace disruption under *Pickering* is far from clear. Furthermore, the bulk of Jennings' disquiet appears to have stemmed from her conversation with Rederford, an event that may have been precipitated by the flyer, but was nonetheless separate from the flyer. That said, the flyer appears to have been the root of a dust-up of sorts in the office—a *Pickering* disruption writ small.

The investigation of Jennings' complaint of harassment may conceivably be a form of workplace disruption. There is little detail in the record about the extent (in hours, for example) to which this disrupted Braddock and Wong in the performance of their normal duties, but it is undisputed that their investigation required at least an interview with Jennings, contact with the city attorney and drafting of a brief memorandum report. Of course, this sort of work—smoothing over employee grievances to maintain workplace harmony—is part of a supervisor's job description. In a sense, Braddock and Wong's efforts were "all in a day's work."

Defendants also urge that the City has an interest in enforcing its anti-harassment policies and complying with state and local anti-harassment law. While these policies doubtless serve noble purposes, the court is not convinced that these policies are independent interests weighing in the public employer's favor in the *Pickering* balance, for four reasons. First, the status of AI 71 as official policy pursuant to state law is irrelevant; it should go without saying that the First Amendment is a federal constitutional provision to which state and local laws must yield. See US Const Art VI cl 2. Second, the notion of enforcing a policy or law for its own sake is foreign to the *Pickering* analysis, which requires the

court to focus on reasonable predictions of workplace disruption. It may be that the policy or law is aimed at avoiding workplace disruption; but if that is so, then the efficacy of the policy or law—not its simple existence—is the interest that a defendant brings to the court. Third, it is bootstrapping to argue that a public employer has a legitimate interest in enforcing the very policy or law a plaintiff attacks as unconstitutional in its application to him. Indeed, if the policy or law is unconstitutional in some application, the state has *no* legitimate interest in enforcing it in that context. And fourth, had plaintiffs' flyer been removed in the absence of actual or predicted workplace disruption—i.e., if defendants' justification was enforcement of AI 71, standing alone—this case would more clearly present as a case of state enforcement of ideological orthodoxy. But as it stands, there is an element of maintaining a reasonably harmonious workplace in the face of strongly held opposing beliefs.

Having laid out plaintiffs' and defendants' competing interests, the court must strike the balance called for by *Pickering*. Neither side has presented a strong case. But, the facts being undisputed, the court must resolve the question of law posed by *Pickering*. The interests on both sides are slight: On the one hand, defendants' restriction of plaintiffs is far from a wholesale muzzling, but on the other hand, the suppressed speech was not patently inflammatory "fighting words." To be sure, it caused friction in the workplace, but there is a difference between episodes of friction—which are the daily incidents of life in a pluralistic society—and disruption—which impairs the government's ability to discharge its duties to its citizens. The City must tread carefully when it exercises its authority to suppress its employees' speech.

Because the flyer plainly addresses a matter of public concern, it is defendants' burden to show that the City's interest outweighs plaintiffs' interest. *Pool*, 297 F3d at 906. This balance must be resolved in the City's favor for two reasons.

First, plaintiffs' interest in this particular channel of communication is vanishingly small. It is undisputed that plaintiffs may promote GNEA outside of work and may do so even at work under proper conditions. Plaintiffs do not have a privileged First Amendment interest in communicating their message *to their officemates*, for their First Amendment rights derive from their status as citizens, not their status as employees. Their right to speak to their coworkers at CEDA is no greater than the right of a citizen at large to speak his message to CEDA employees—which is to say, plaintiffs have little rights at all in the particular channel they chose.

The second reason that defendants prevail is that their response to Jennings' complaint—removal of the flyer without any adverse employment action against plaintiffs—was a narrowly tailored and proportionate response to the actual workplace disruption or, perhaps better described, distraction. An actual adverse employment action against plaintiffs would very likely not be justified on these facts, and the City would be well to consider this for the future. But the City does have an "administrative interest" in avoiding situations that distract employees from their jobs. See *Pool*, 297 F3d at 906. *Pickering* counsels that public employers must, of necessity, be afforded some leeway in fixing their employees' attention on their tasks, free from upset stemming from public controversies having no bearing on the work of the employer.

Finally, the court addresses an argument for equal treatment that plaintiffs press—albeit without offering support in the case law. See, e.g., Pls Opp (Doc #46) at 5:17-23 (complaining of "double standards"; the refusal to treat "exclusionary slurs such [as] 'homophobes" as violations of AI 71; and a failure "to accommodate views concerning homosexuality [held] by * * * religious adherents"). Plaintiffs' disparate treatment argument, while superficially appealing, is simply not recognized by *Pickering* and its progeny, and with good reason: Intervention by a court in restrictions on

employee speech under *Pickering*'s balancing test already carries a substantial risk of interference with government operations; to inquire further into allegations of disparate treatment in restrictions of different employees' speech would remit the disciplinary operations of public agencies to the micromangement of the courts. In other words, *Pickering* draws a line: So long as a public employee's speech is restricted only when the employer presents an overbalancing concern of workplace disruption, a court will defer to the employer's decision, irrespective whether the employer has responded in kind to similar speech.

In sum, the court concludes that plaintiffs' First Amendment rights were not abridged by the removal of the flyer.

IV

Plaintiffs also seek prospective relief, specifically, an "[i]njunction restraining Defendants from prohibiting Plaintiffs from * * * communicating at their workplace" and a declaration of "the rights and other legal relations of the parties to the subject matter here in controversy." Compl (Doc #1) at 12-13. In essence, plaintiffs want guidance about what they can and cannot post around the office. The court does not dispense this sort of advice.

The only concrete controversy plaintiffs have presented to the court is the controversy over the flyer in the copy room. On the undisputed facts of that incident—considering plaintiffs' alternative channels of communication, the form of their speech and the ensuing events in their workplace—the court has concluded that plaintiffs' First Amendment rights were not violated. To the extent that plaintiffs seek to put other scenarios before the court, their challenge is unripe: Plaintiffs offer no details of the flyers they wish to post or other workplace speech they wish to make, and they offer no evidence regarding the workplace disruption that might (or might not) ensue. At most, plaintiffs point to Hicks' memo of

February 20, 2003, as a threat of termination, but a reminder in a widely circulated memo that compliance with policy is a condition of employment can hardly be taken as a concrete and imminent chill on protected expression or an individually directed threat of adverse employment action. Moreover, defendants have both moved on to other jobs, and plaintiffs offer no evidence that defendants' successors would take the same view of the application of AI 71.

Relatedly, the court doubts that it could craft any generalized equitable or declaratory relief in this area of the law. For better or worse, *Pickering* requires case-by-case analysis that turns on fact-intensive inquiries into a plaintiff's interest in speaking and the public employer's interest in efficient workplace operations. Cf *Moran*, 147 Fad at 847 (noting that because the *Pickering* analysis is so context-sensitive, defendants will typically have a strong argument for qualified immunity).

To be sure, matters at the extremes are clear. On one extreme, stifling of every expressive channel available to plaintiffs without any showing of workplace disruption would likely be a violation of their First Amendment rights; on the other extreme, a limited restriction closely tailored to actual and severe workplace disruption would likely not violate plaintiffs' First Amendment rights. Much as plaintiffs might hope otherwise, the gray area within this vast and multidimensional constitutional continuum is not reducible to the language of an injunction. This further confirms the court's view that no concrete actual controversy is before it with regard to plaintiffs' claim for prospective relief.

Accordingly, the court concludes that plaintiffs' claim for equitable and prospective declaratory relief is nonjusticiable and *sua sponte* dismisses that claim under FRCP 12(h)(3).

V

In sum, the court GRANTS defendants' motion for summary judgment (Doc #40) with respect to plaintiffs' claims for retrospective relief, and *sua sponte* dismisses plaintiffs' claims for prospective relief pursuant to FRCP 12(h)(3). The clerk is DIRECTED to close the file and terminate all motions.

IT IS SO ORDERED.

/s/ _____
VAUGHN R WALKER
United States District Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. CV 03-03542 VRW

GOOD NEWS EMPLOYEE ASSOC., *et al.*,
Plaintiff,

v.

JOYCE M. HICKS, *et al.*,
Defendant.

JUDGMENT IN A CIVIL CASE

( ) Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that judgment is entered in favor of defendants and against the plaintiffs.

Dated: February 16, 2005

Richard W. Wieking, Clerk

By: /s/ Cora Delfin
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No C 03-3542 VRW

GOOD NEWS EMPLOYEE ASSOCIATION,
REGINA REDERFORD and ROBIN CHRISTY,
Plaintiffs,

v.

JOYCE M HICKS, in her individual and official capacities, as Deputy Executive Director of the Community & Economic Development Agency of the City of Oakland, ROBERT C BOBB, in his individual and official capacity, as City Manager of the City of Oakland and City of Oakland,
Defendant.

ORDER

Defendants Joyce M Hicks (Hicks) and Robert C Bobb (Bobb) move the court to dismiss plaintiffs Good News Employee Association (Good News), Regina Rederford (Rederford) and Robin Christy's (Christy) complaint: (1) pursuant to FRCP 41(b) for failure to prosecute (Doc # 25); and (2) pursuant to FRCP 12 (b) (6) on the grounds that the complaint fails to state a claim (Doc # 13). For the reasons set forth below, defendants' motion to dismiss for failure to prosecute is GRANTED as to claims against the City of Oakland but DENIED as to claims against Hicks and Bobb (Doc # 25). Defendants' motion to dismiss for failure to state a claim (Doc # 13) is GRANTED in part and DENIED in part.

I

A

The following facts are drawn from plaintiffs' complaint (Doc # 1) filed on July 30, 2003. Plaintiffs Rederford and Christy are employees of the City of Oakland (the City) and the cofounders of the Good News Employees Association (Good News). Compl at 2 ¶¶ 7-8. Rederford, Christy and their associates "regularly engage in prayer and other peaceful activities as part of their expressive, political, and religious activities with [Good News]." *Id* at 2 ¶ 9. At the time the events described in the complaint transpired, defendant Hicks was the Deputy Director of the City's Community and Economic Development Agency and was personally responsible for enforcing the policy at issue in this case. *Id* at 3 ¶ 11. Defendant Bobb was the City Manager and was also personally responsible for enforcing and drafting the policy. *Id* at 3 ¶ 12.

In March 2002, a group of homosexual employees was given access to the City's email system for the purposes of advertising various associational and political activities. *Id* at 4 ¶ 17. Plaintiffs asked to be given a similar opportunity to communicate with the other employees regarding their various Christian religious activities but were denied. *Id* at 4 ¶ 18. Plaintiffs allege that defendants denied them such opportunity because "[defendants] do not approve of the Christian beliefs, practices, and activities of [p]laintiffs." *Id.*

On or about January 3, 2003, plaintiffs decided to post a flyer on their employee bulletin board "to announce the existence and activities of [Good News] to the other City employees." *Id* at 4 ¶ 19. The flyer was entitled "Preserve Our Workplace With Integrity" and stated, "*Good News* Employee Association is a forum for people of *Faith* to express their views on the contemporary issues of the day. With respect for the Natural Family, Marriage and Family

values. If you would like to be a part of preserving integrity in the Workplace call Regina Rederford @ XXX-XXXX or Robin Christy @ XXX-XXXX." *Id* at 4 ¶ 19, Exh 2 (emphasis in original). The flyer also contained a picture of six candles in a holder, arranged in the fashion of a menorah. *Id.* On that same date, defendants directed that the flyer be removed from the employee bulletin board. *Id* at 4 ¶ 19.

Both before and after plaintiffs posted their flyer, the employee bulletin board has been used by the employees for the promotion of "various political, social, and religious causes and events." *Id* at 4 ¶ 20. For example, employees have posted flyers concerning hate crimes, Osama bin Laden, Christmas celebrations, local sporting events, General Norman Schwartzkof's views on the September 11, 2001, terrorist attacks and the ability of war to eliminate social ills like slavery and fascism. *Id* at 4 ¶ 20, Exh 3. No punitive action was taken against any of the employees who posted such material, and apparently none of such material was removed from the employee bulletin board. *Id* at 4 ¶ 20. Plaintiffs allege that defendants "have shown an unlawful preference for human secularism and homosexual world views" and "have taken an affirmative and explicit stance against the religious views of [p]laintiffs." *Id* at 4-5 ¶ 20.

Plaintiffs allege that, on or about February 20, 2003, defendants developed and distributed an antidiscrimination/ nonharassment policy regarding employee conduct. *Id* at 5 ¶ 21, Exh 1. The letter accompanying the policy is dated February 20, 2003. *Id* at Exh 1 at 1. In the letter, however, defendant Hicks asserted that the policy had been in effect since January 1, 2003, and the policy itself is dated as effective on January 1, 2003. *Id* at Exh 1 at 1, 4. Hicks also explained in the letter that "[the City] ha[s] recently had incidents * * * where staff has inappropriately posted printed materials that are in violation of [the policy]. Specifically flyers were placed in public view which contained statements

of a homophobic nature and were determined to promote sexual orientation based harassment." *Id* at Exh 1 at 1. The accompanying policy describes prohibited types of behavior, the definition of harassing conduct, types of harassment by group (including religion-based and sexual-orientation-based discrimination) and complaint and investigation procedures. *Id.*

Plaintiffs maintain that the policy "is presently being enforced and was a direct and discriminatory response against the First Amendment activities of [p]laintiffs." *Id* at 5 ¶ 21. Plaintiffs assert that defendants "have not attempted to silence any other group of employees, although homosexual advocacy groups and others exist at [d]efendants' offices." *Id.* This practice, plaintiffs assert, constitutes "a censorship policy against anything [defendants] believe to be 'homophobic.'" *Id* at 5 ¶ 22. According to plaintiffs, defendants have unlawfully characterized plaintiffs' flyer as homophobic. *Id.*

B

Plaintiffs filed their complaint in this action on July 30, 2003, naming Hicks, Bobb and the City as defendants. Doc # 1. Plaintiffs' complaint stated causes of action pursuant to 42 §§ 1983 and 1988 against the defendants for violation of: (1) the United States Constitution's First Amendment's Free Speech Clause; (2) the First Amendment right to peaceable assembly; (3) the First and Fourteenth Amendment right to privacy; (4) the First Amendment's Free Exercise Clause; (5) the Fourteenth Amendment's Due Process Clause; (6) the Fourteenth Amendment's Equal Protection Clause; (7) the First Amendment's Establishment Clause; (8) the Fifth Amendment's Takings Clause; (9) the laws and regulations of the City on the basis of ultra vires acts; and (10) Article I § 4 of the California Constitution.

On November 7, 2003, defendants Hicks and Bobb filed the instant Rule 12(b)(6) motion to dismiss and noticed the

motion for January 22, 2004. Doc # 13. In its motion, defendants indicated that defendant City had not been explicitly included in the motion to dismiss because the City had not been served as of the date the motion was filed. Mot Dism (Doc # 13) at 1:6 n1.

On November 26, 2003, the parties filed a stipulation to continue the hearing on the motion to dismiss to February 5, 2004. Doc # 15. On January 5, 2004, the court ordered that the hearing be rescheduled for that date. Doc # 17. Subsequently, on January 8, 2004, plaintiffs filed their opposition to defendants' motion to dismiss. Doc # 18. Defendants filed their reply on January 22, 2004. Doc # 19.

In spite of stipulating to the hearing date for the motion, plaintiffs failed to attend the scheduled February 5, 2004, hearing. Doc # 22. At the motion hearing, defendants also informed the court that plaintiffs still had not served the City. Later that day, the court ordered plaintiffs to show cause why the action should not be dismissed for failure to prosecute due to plaintiffs' failure to serve the City and to attend the motion hearing. 2/5/04 OSC (Doc # 21) at 2:15-19. The court gave defendants leave to submit their expenses incurred both in attending the February 5 hearing and in defending the entire case. *Id* at 2:20-22. The court set the matter for further hearing on March 11, 2004. *Id* at 2:24-3:2.

On February 25, 2004, plaintiffs submitted a declaration in response to the court's OSC, listing a "number of unusual and catastrophic occurrences in both [plaintiffs' attorney's] personal and professional life." Decl Richard Ackerman (Ackerman Decl; Doc # 24) at 2 ¶ 6. During the six-week period prior to the motion hearing date, attorney Ackerman had experienced: (1) extensive health problems with his baby son; (2) a flood in his home the week before Christmas; (3) an office fire two weeks after the flood; and (4) computer problems. *Id* at 2-4 ¶¶ 6(1)-(4).

On February 26, 2004, defendants filed a formal motion to dismiss for failure to prosecute. Doc # 25. As they had indicated at the February 5 hearing, defendants stated that the City had not been served and provided substantial supporting documentation of that fact. Mot Fail Pros (Doc # 25) at 1:16-3:21; see also Decl Angela Padilla (Padilla Decl; Doc # 27) at 1-2 ¶¶ 2-9, Exhs A-F. Defendants also contended that plaintiffs provided no good excuse for not appearing at the February 5 hearing. Mot Fail Pros at 3:22-4:11. Defendants requested $156,612.64 in legal fees and expenses (a figure that includes attorney fees). *Id* at 4:12-5:12. Plaintiffs filed a response to the motion on March 2, 2004 (Doc # 28), and defendants filed a reply on March 4, 2004 (Doc # 30).

At the March 11, 2004, hearing, the court took argument both on the alleged failure to prosecute and the Rule 12(b)(6) motion to dismiss. At the hearing, plaintiffs conceded that they had failed properly to serve the City and also represented that the City's presence as a defendant was not critical to further prosecution of the action. Plaintiffs' counsel also accepted responsibility for the failure to appear on February 5, 2004, and conceded that plaintiffs were responsible for defendants' expenses for the unnecessary appearance. Defendants nevertheless urged that the entire case should be dismissed pursuant to Rule 41(b), based in part on the contention that plaintiffs' responses to the OSC contained misstatements about service on the City rising to the level of Rule 11 violations.

Accordingly, the court must decide: (1) whether plaintiffs have discharged the February 5, 2004, OSC; and (2) whether any or all of the ten claims stated in plaintiffs' complaint should be dismissed pursuant to Rule 12(b)(6).

II

A

The court first determines whether plaintiffs have discharged the OSC with respect to failure to prosecute. The court, may dismiss an action "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court." FRCP 41(b). To determine whether an action should be dismissed for failure to prosecute, the court should consider: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) risk of prejudice to defendants; (4) the availability of less drastic alternatives; and (5) the public policy favoring disposition of cases on their merits. *Pagtalunan v Galaza*, 291 F3d 639, 642 (9th Cir 2002). The five factors favor dismissal of the claims against the City but not of the claims against Hicks and Bobb.

The first factor of expeditious resolution of litigation "always favors dismissal." *Id* at 642 (citation omitted). Thus, this factor tilts toward dismissal with respect to the claims against all defendants.

The second factor regards the management of the court's docket and also favors dismissal of all the claims. The court must be able to manage its docket "without being subject to routine noncompliance of litigants such as [plaintiffs]." *Id.* One Ninth Circuit judge has remarked "the weight of the docket-managing factor depends upon the size and load of the docket, and those in the best position to know what that is are our beleaguered trial judges." *Id* at 644 (Trott, J, concurring). Plaintiffs have failed repeatedly to serve the City, despite numerous stipulations extending their deadline to do so, and plaintiffs have also disregarded the hearing date to which they stipulated. In light of the undersigned's rather substantial caseload, plaintiffs' disregard of rules and deadlines makes this factor tilt toward dismissal.

The third factor involves risk of prejudice to defendants. The Ninth Circuit views prejudice in conjunction with delay and has stated that "[t]he longer the delay, the more likely prejudice becomes." *Nealey v Transportacion Maritima Mexicana, SA*, 662 F2d 1275, 1280 (9th Cir 1980); see also Pagtalunan, 291 F3d at 642. Plaintiffs' excuse or justification for their disobedience or delay is also relevant. *Nealey*, 662 F2d at 1280.

This factor favors dismissal with respect to the claims against the City. First, plaintiffs provide no reasonable excuse for failure to serve the City. In their opposition to defendants' Rule 41(b) motion, plaintiffs contend that service upon two City officials (Bobb and Hicks) was sufficient, despite the fact that the summons did not separately name the City as a defendant. See Opp Mot Dism Fail Pros (Doc # 28) at 3:15-16. Plaintiffs, however, have stipulated on several occasions that the City has not yet been served. See Padilla Decl at 2 ¶¶ 3, 5, Exhs A, C. Moreover, plaintiffs conceded at the March 11 hearing that they had not properly served the City. Such stipulations and representations should be binding upon plaintiffs. See *American Title Ins Co v Lacelaw Corp*, 861 F2d 224, 226 (9th Cir 1988). Second, defendants have pointed to potential prejudice because plaintiffs' failure to serve the City has forced defendants to file a Rule 12(b)(6) motion to dismiss with respect to some, but not all, of the defendants. This would allow plaintiffs to "see how this [c]ourt [would] rule" before deciding whether to prosecute or whether voluntarily to dismiss its claims against the City. Def OSC Response (Doc # 30) at 3:4-6. In combination with plaintiffs' lack of explanation for their failure, defendants have shown that the prejudice factor favors dismissal of the claims against the City.

But with respect to plaintiffs' claims against Hicks and Bobb, this showing is not met. Although plaintiffs do not indicate why another attorney could not have attended the

February 5 hearing, plaintiffs at least demonstrate that attorney Ackerman faced a number of travails during January and February 2004. If defendants could demonstrate prejudice, this explanation would likely be insufficient, since Ackerman (as a practicing attorney) arguably should have handed the case to one of his colleagues if his personal life was too chaotic adequately to prosecute this case. The only prejudice to defendants, however, is that they were forced to attend an unnecessary motion hearing. While this cost defendants some money and delayed resolution of their motion, it does not appear substantially to have hampered their ability to defend against the claims. Additionally, defendants' contention that plaintiffs' OSC responses are materially false is insufficient to demonstrate prejudice. Despite the misstatements, the court is well aware that plaintiffs have not properly served the City, and defendants will suffer no adverse consequences as a result.

The fourth factor is availability of less drastic alternatives. With respect to the claims against the City, the court conceivably could extend plaintiffs' deadline properly to serve the City. But defendants currently have a motion to dismiss pending, and allowing plaintiffs to serve an additional defendant might interfere with the disposition of this motion. Further, plaintiffs have conceded the utility of pursuing the action against the City. Thus, less drastic alternatives do not. seem particularly appealing with respect to the claims against the City. The claims against Hicks and Bobb, however, are a different matter. Plaintiffs could be ordered to pay defendants' expenses incurred as the result of attending the February 5 hearing, and this serves to correct much of the prejudice defendants experienced as a result of that unnecessary appearance.

The fifth factor of public policy favors not dismissing any of the claims, as public policy favors resolution on the merits. *Pagtalunan*, 291 F3d at 643. Thus, four factors favor

dismissal of the claims against the City, while three factors favor allowing the claims against Hicks and Bobb to proceed. The February 5, 2004, OSC is thus DISCHARGED with respect to the claims against Hicks and Bobb, but not with respect to the claims against the City. Accordingly, defendants' motion to dismiss pursuant to Rule 41(b) is DENIED as to Bobb and Hicks but is GRANTED as to the City (Doc # 25).

B

The court must also consider whether plaintiffs should be responsible for paying defendants' expenses incurred in prosecuting this case. Defendants submit a rather hefty request for expenses—over $150,000. In light of the fact that the claims against Hicks and Bobb ought to proceed on the merits, forcing plaintiffs at this time to reimburse defendants for all their expenses incurred in this lawsuit is certainly excessive.

In the court's view, plaintiffs should be responsible for defendants' unnecessary expenses incurred in attending the February 5, 2004, hearing. Plaintiffs took responsibility for their error with respect to the hearing and also conceded that defendants were entitled the expenses incurred as a result. Additionally, awarding expenses for attending the hearing cures any potential prejudice to defendants that resulted from the unnecessary appearance. Defendants' expenses for attending the hearing were $1,353.50. Def Response OCS at 6:7. Accordingly, the court ORDERS that plaintiffs reimburse defendants in the amount of $1,353.50.[1]

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[1] The court is satisfied that the amount of this award is fair, based on plaintiffs' concession at the March 11 hearing that such an amount would be appropriate. But defendants ought to be aware that, should they request attorney fees in the future, they must submit sufficient documentation to establish the reasonableness of their claimed number of hours and their claimed hourly rates, in keeping with the standards the court set forth in

III

A

FRCP 12(b) (6) motions to dismiss essentially "test whether a cognizable claim has been pleaded in the complaint." *Scheid v Fanny Farmer Candy Shops, Inc*, 859 F2d 434, 436 (6th Cir 1988). FRCP 8(a), which states that plaintiff's pleadings must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," provides the standard for judging whether such a cognizable claim exists. *Lee v City of Los Angeles*, 250 F3d 668, 679 (9th Cir 2001). This standard is a liberal one that does not require plaintiff to set forth all the factual details of her claim; rather, all that the standard requires is that plaintiff give defendant fair notice of the claim and the grounds for making that claim. *Leatherman v Tarrant County Narcotics Intell & Coord Unit*, 507 US 163, 168 (1993) (citing *Conley v Gibson*, 355 US 41, 47 (1957)). To this end, plaintiff's complaint should set forth "either direct or inferential allegations with respect to all the material elements of the claim". *Wittstock v Van Sile, Inc*, 330 F3d 899, 902 (6th Cir 2003).

Under Rule 12(b)(6), a complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Hughes v Rowe*, 449 US 5, 9 (1980) (citing *Haines v Kerner*, 404 US 519, 520 (1972)); see also *Conley*, 355 US at 45-46. All material allegations in the complaint must be taken as true and construed in the light most favorable to plaintiff. See *In re Silicon Graphics Inc Sec Lit*, 183 F3d 970, 980 n10 (9th Cir

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Allen v BART, C00-3232 VRW, Order Granting Attorney Fees (Doc # 92), and modified in *Gilliam v Sonoma Cty*, C-02-3382 VRW, Order Granting Attorney Fees (Doc # 51). Those orders are available on the website for the Northern District of California, as well as in the Northern District's electronic filing database.

1999). But "the court [is not] required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v Golden State Warriors*, 266 F3d 979, 988 (9th Cir 2001) (citing *Clegg v Cult Awareness Network*, 18 F3d 752, 754-55 (9th Cir 1994)).

Review of a FRCP 12(b)(6) motion to dismiss is generally limited to the contents of the complaint, and the court may not consider other documents outside the pleadings. *Arpin v Santa Clara Valley Transp Agency*, 261 F3d 912, 925 (9th Cir 2001). The court may, however, consider documents attached to the complaint in connection with a motion to dismiss. *Parks School of Business, Inc v Symington*, 51 F3d 1480, 1484 (9th Cir 1995). Additionally, "[t]he court need not * * * accept as true allegations that contradict matters properly subject to judicial notice * * *." *Sprewell*, 266 F3d at 988 (citing *Mullis v United States Bankr Ct*, 828 F2d 1385, 1388 (9th Cir 1987)).

B

Plaintiffs' complaint states causes of action for violation of: (1) the First Amendment's Free Speech Clause; (2) the First Amendment right to peaceable assembly; (3) the First and Fourteenth Amendment right to privacy; (4) the First Amendment's Free Exercise Clause; (5) the Fourteenth Amendment's Due Process Clause; (6) the Fourteenth Amendment's Equal Protection Clause; (7) the First Amendment's Establishment Clause; (8) the Fifth Amendent's Takings Clause; (9) the laws and regulations of the City on the basis of ultra vires acts; and (10) Article I § 4 of the California Constitution. The court addresses each claim in turn.

1

Plaintiffs' Free Speech Clause claims seem to be premised on two arguments: (a) defendants' removal of plaintiffs' flyer violates plaintiffs' free speech rights; and (b) defendants'

policy regarding discrimination and harassment is unconstitutionally vague and overbroad.

a

The court first addresses plaintiffs' claim regarding defendants' removal of plaintiffs' flyer. Speech by a government employee is governed by the standard first articulated in *Pickering v Bd of Educ of Township High School Dist 205, Will County*, 391 US 563 (1968) and further clarified in *Connick v Myers*, 461 US 138 (1983). See *Waters v Churchill*, 511 US 661, 668 (1993). Pickering involved teacher Pickering, who was fired by the education board on the basis of a letter he sent to the local newspaper. The letter was critical of the way the education board and school superintendent had handled revenue-raising proposals. *Pickering*, 391 US at 564. In analyzing Pickering's claim that his dismissal violated his First Amendment rights, the Supreme Court recognized that "a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment." *Connick*, 461 US at 140 (citing *Pickering*, 391 US at 568). But the *Pickering* court also emphasized that "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering*, 391 US at 568. The Court found that Pickering's letter addressed a "matter of legitimate public concern" on which "free and open debate is vital to informed decision-making by the electorate." *Id* at 571-72. Reasoning that the education board did not have strong interests in limiting Pickering's contribution to the public debate, since "the fact of employment [was] only tangentially and insubstantially involved in the subject matter of the public communication," the court found that Pickering could not be dismissed on the basis of his letter. *Id* at 573-574.

The Supreme Court further described the standards for protected governmental employee speech in its opinion in *Connick*. In that case, assistant district attorney Myers, displeased at having been transferred to a different section of her office, prepared and distributed a questionnaire to solicit the opinions of her coworkers on issues regarding office policy and morale. *Connick*, 461 US at 140-41. Myers was subsequently terminated on the basis of her refusal to accept the transfer and because her distribution of the questionnaire was considered "an act of insubordination." *Id* at 141. In analyzing whether Myers' termination had been made in violation of the First Amendment, the Supreme Court noted that *Pickering* and its progeny "involved safeguarding speech on matters of public concern." *Id* at 145. The Court drew a line between speech on a matter of public concern and speech on a matter of private concern: "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id* at 146. As such, when an employee speaks or seeks to speak not as a citizen on a matter of public interest, but instead as "an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision * * *." *Id* at 147. To determine whether the employee's speech addresses a matter of public concern, the Court stated, the reviewing court must review the "content, form, and context of a given statement * * *." *Id* at 147-48. Employing such procedure, the Court found that most of Myers' questions regarding discipline and morale were designed "not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors." *Id* at 148. Moreover, "Myers did not seek to inform the public" about the results of her

survey. As such, the Court concluded that most of the questionnaire did not touch on matters of public concern. *Id.*

The Court found that one of Myers' questions—relating to whether the employees felt pressured to work on political campaigns—could be considered a matter of public concern. Id at 149. As such, the Court concluded that such speech must be analyzed by "the *Pickering* balance[, which] requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." Id at 151. The Court, quoting Justice Powell's separate opinion in *Arnett v Kennedy*, 416 US 134, 168 (1974), stated that:

> [T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

Connick, 461 US at 151. In evaluating the government's interest in preventing workplace disruption, the Court considered the impairment of "close working relationships," the "manner, time, and place in which [the message] is delivered" and whether the employee's speech "arises from an employment dispute concerning the * * * application of [office] policy to the speaker * * *." *Id* at 151-53. The Court also emphasized that the government employer did not need "to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Id* at 152. Taking these factors into consideration, the Court concluded that Myers' interest in being able to ask the question regarding political pressure was outweighed by the government's considerable interest in proscribing behavior that "would disrupt the office, undermine

[its] authority, and destroy close working relationships." *Id* at 154.

Subsequently, the Ninth Circuit has interpreted *Pickering* and *Connick* to require the governmental employee to show that: (1) her speech was on a matter of public concern and thus was constitutionally protected; and (2) that the speech in question was a "substantial or motivating factor" for the adverse employment action. *Pool v Vanrheen*, 297 F.3d 899, 906 (9th Cir 2002). If the employee fails to demonstrate that the speech addresses a matter of public concern, then the claim should be dismissed without further inquiry. See *Moran v State of Washington*, 147 F.3d 839, 846 (9th Cir 1998). Should the employee make the first two showings, the employer then must show that its "legitimate administrative interests" in promoting workplace efficiency outweigh the employee's interest in freedom of speech. *Pool*, 297 F.3d at 906. The inquiry into the protected status of speech is one of law, not of fact. *Id.*

Defendants first argue that plaintiffs cannot state a free speech claim because the only speech identified in the complaint (the flyer) does not touch on a matter of public concern. Mot Dism at 5:10-6:2. Defendants argue that the flyer was only an invitation to join a group committed to "preserving integrity in the workplace" and that such group had been formed in response to a "perceived inequity in the City's decision to allow a homosexual group of employees use of the City's e-mail while restricting [p]laintiffs' use of the e-mail." *Id* at 5:2126. Plaintiffs disagree with this characterization of the flyer, saying that "[s]ame sex marriage, homosexual rights, and the balancing of [f]aith with developments in the homosexual rights arena[] are at the very forefront of modern dialogue about human rights, legal progression, and socio-political philosophy." Opp Mot Dism (Doc # 18) at 6:16-19.

The court agrees with plaintiffs that the flyer touches on a matter of public concern. "Speech by public employees may be characterized as not of 'public concern' when it is clear that such speech deals with individual personnel disputes and grievances and that the information would be of no relevance to the public's evaluation of the performance of governmental agencies." *Pool*, 297 F3d at 907 (citation omitted; emphasis in original). But the Ninth Circuit has defined speech on a public concern in a very broad fashion, including speech "'that can fairly be considered as relating to any matter of political, social, or other concern to the community * * *.'" *Tucker v California Dep't of Educ*, 97 F3d 1204, 1210 (9th Cir 1996), quoting *Gillette v Delmore*, 886 F2d 1194, 1197 (9th Cir 1989). This seems to "include almost *any* matter other than speech that relates to internal power struggles within the workplace." *Tucker*, 97 F.3d at 1210 (emphasis in original). Moreover, the employee "need not address the public at large for his speech to be deemed to be on a matter of public concern." *Id.*

In the case at bar, plaintiffs' flyer might reasonably be read to implicate homosexuality, a topic of considerable public interest, especially given developments of the past few years concerning same-sex marriage, civil unions, "Don't Ask, Don't Tell" personnel policies of the military and the like. Of course, this topic must be inferred, as there is no explicit reference to homosexuality in the flyer. The flyer appears more directly aimed at the City's personnel policy ("preserving integrity in the workplace"), which is indisputably a matter of public concern. The flyer suggests that the meeting will focus on whether the City's personnel policies are appropriate in light of plaintiffs' moral outlook ("Natural Family, Marriage and Family values"). Taken together, homosexuality and a group that will be debating such an issue in the context of public employment can be fairly characterized as a matter of public concern. See *Greer v Amesqua*, 212 F.3d 358, 371 (7th Cir 2000) (finding that a newspaper

release concerning homosexual favoritism at a fire department constituted a matter of public concern). It is also true that the flyer solicits only members of plaintiffs' workplace and may have been written and posted in response to an internal personnel dispute that plaintiffs were having with defendants. But the court would be hard-pressed to characterize the flyer as "having no relevance to the public's evaluation of the performance of government agencies." On the contrary, the City's policies regarding homosexuals are no doubt of considerable interest to the public. Accordingly, the court finds that the flyer touches on a matter of public concern.

With respect to the second question—whether the speech was a substantial or motivating factor in the adverse employment action—the court finds that plaintiffs' complaint is sufficient. The complaint alleges that defendants removed the flyer on the basis of its characterization as "homophobic." See Compl at 5 ¶ 22. And defendants' anti-discrimination policy refers to plaintiffs' flyers as being "homophobic" in nature. Id at Exh 1 at 1. The complaint thus links the character of the speech with defendants' decision to take adverse action against plaintiffs. Of course, the adverse action—removal of the flyer—is considerably less serious than the adverse actions taken in most other cases. See, e g, *Pickering*, 391 US at 564 (teacher terminated); *Connick*, 461 US at 141 (attorney terminated).

Given that the first two factors are satisfied, the court must undertake the final inquiry—whether defendants have met their burden in showing that their interests as employers outweigh plaintiffs' interests in making the speech. Defendants argue that their interest in maintaining an efficient office environment outweighs any interest that plaintiffs have in posting the flyer. Mot Dism at 6:3-8:11. Plaintiffs respond that the need for maintaining an efficient office is not implicated by the flyer. Opp Mot Dism at 7:1-22. Although

the question is close, the court agrees with plaintiffs that defendants have not met their burden, at least at this stage of the proceedings.

The court begins its balancing inquiry by examining the strength of plaintiffs' interests in posting the flyer. All in all, the court cannot conclude that plaintiffs' interests were particularly strong, at least in contrast with other cases in which free speech rights have been restricted. Plaintiffs do not allege that they were unable to provide information about their organization to their coworkers in any other manner. Nor does defendants' anti-discrimination policy seem to apply outside the workplace. Plaintiffs are free to post flyers at other locations and have not been restricted from voicing their views on homosexuality, the anti-discrimination policy, the natural family or any other related topic in any other location besides the workplace bulletin board (and perhaps the workplace email system). A government employee's interest in speech is much stronger when the prohibition or regulation is broad and sweeping, rather than limited to particular contexts. See Tucker, 97 F3d at 1210 (finding that the balance favored the employee when the regulation precluded all religious speech of any form); *Los Angeles Police Protective League v Gates*, 579 F Supp 36, 39-40 (CD Cal 1984) (finding that the employee's interest was weaker than the government employer's interest when the restriction on employee speech was limited and allowed speech at other times and in other manners).

Plaintiffs also spend considerable time in their opposition brief arguing that they "have a [r]ight to [r]eligious expression at the [w]orkplace." Opp Mot Dism at 7:23. It is no doubt true that religious speech is entitled to the same level of protection as other forms of speech. See, e.g., *Child Evangelism Fellowship of New Jersey, Inc v Stafford Township School Dist*, 233 F Supp 2d 647, 656 (D NJ 2002) (citing *Heffron v Int'l Soc'y for Krishna Consciousness*, 452 US 640,

647 (1981)). But there is no reason to believe that religious expression deserves any more protection in the workplace than nonreligious expression does, and plaintiffs present the court with virtually nothing from which the court might draw such a conclusion. Most of the cases that plaintiffs cite do not involve religious expression by government employees. Cf *Widmar v Vincent*, 454 US 263 (1981) (considering whether a state university could prohibit a religious group from using generally available facilities); *Police Dep't of the City of Chicago v Mosley*, 408 US 92 (1972) (considering constitutionality of labor ordinance that exempted peaceful picketing from its general prohibition on picketing near a school); *Daugherty v Vanguard Charter School Academy*, 116 F Supp 2d 897 (WD Mich 2000) (considering claims of parents who alleged that their minor children had been subjected to Christian influences at school in violation of the Establishment Clause).

The only other case plaintiffs cite for this proposition is *May v Evansville-Vanderburgh School Corp*, 787 F2d 1105 (7th Cir 1986). In that case, Judge Posner rejected the plaintiff schoolteacher's arguments that she was entitled under the First Amendment to use school property for religious purposes. The only basis for such a claim that Judge Posner found plausible was if such a claim was based on public/nonpublic forum doctrine. See *id* at 1112-15. But Judge Posner also cautioned that "we might * * * question the relevance of any sort of 'forum' analysis to a case where government employees are seeking to use government premises for the communication of ideas and opinions to each other only, so that the public at large is not involved." *Id* at 1114. Plaintiffs present no argument regarding why forum analysis should apply to plaintiffs' speech, rather than the traditional government employee analysis under *Pickering* and *Connick*. Indeed, the Ninth Circuit has rejected forum analysis in favor of *Pickering/Connick* balancing in a similar context. *Tucker*, 97 F3d at 1209-10 (finding that no public

forum was created by the governmental employer allowing employees to post materials on the walls and instead adopting the traditional balancing test to evaluate employee speech). In short, plaintiffs have provided the court with no reason why religious expression in the workplace should be entitled to any greater protection than other forms of expression.

Despite plaintiffs' relatively weak interests in posting the flyer, the court cannot conclude that defendants' interests in removing the flyer were particularly strong either. In reaching this conclusion, the court recognizes that the Supreme Court determined decades ago that "the State has interests as an employer that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering*, 391 US at 568. Thus, in the context of regulating speech, "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Waters*, 511 US at 675. And "[w]hen someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her." *Id.*

In evaluating whether the governmental employer has an efficiency interest that outweighs the employee's speech interest, the court may look to several factors: (1) the time, place and manner in which the speech arose; (2) whether the speech "impairs discipline by superiors or harmony among co-workers [or] has a detrimental impact of close working relationships for which personal loyalty and confidence are necessary"; or (3) "impedes the performance of the speaker's duties or interferes with the regular operations of the enterprise." *Pool*, 297 F3d at 908-09. In evaluating the governmental employee's interest, the court should consider the speech as it appeared to the employer, if the employer's

view of the speech is reasonable. See *Waters*, 511 US at 677-78.

Based on these factors, the court finds that defendants interests in restricting plaintiffs' speech are not compelling. First, the court considers the time, place and manner of the speech. It is true that plaintiffs' speech was posted at the City workplace on an office bulletin board and thus was in an area within the City employer's control. This makes plaintiffs' case different from cases like *Pickering*, in which the plaintiff's speech appeared in a public newspaper. Accepting the allegations in the complaint as true, however, plaintiffs' speech was not accompanied by anything that would have exacerbated its effects in the workplace. For example, the speech was not explicitly threatening nor expressly directed toward a particular employee or group of employees. Instead, the flyer was merely posted on the bulletin board, along with all the rest of the notices. Thus, this factor does not provide defendants with a particularly strong reason for removing the flyer.

Second, the court considers defendants' interests in maintaining close working relationships and in preventing interference with business operations. In so doing, the court recognizes that defendants have significant interests in restricting discriminatory speech about homosexuals. Allowing such speech in the workplace could undermine the working relationships between the employees, which would impede the employer's effective functioning. Additionally, as defendants point out, defendants have a duty under state law to prevent workplace discrimination on the basis of sexual orientation. See Cal Gov Code § 12940(a). This is significant not just because of the gravity with which defendants must treat such a state law duty. If defendants fail to take precautions against discrimination against homosexuals, defendants risk the possibility of employees bringing hostile work environment lawsuits. Such lawsuits would certainly disrupt the effective

functioning of the workplace, both from the impact on personnel and from the potential drain on the City's resources. Further, "[a] discriminatorily abusive work environment * * * can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." *Harris v Forklift Systems, Inc*, 510 US 17, 22 (1993).

Plaintiffs contend that the flyer cannot reasonably be construed as homophobic. In evaluating whether the flyer touched on a matter of public concern, the court noted that the flyer seems to implicate the issue of homosexuality through the use of language such as "natural family" and "family values," terms used in the heated debate over gay marriage. Although other readings of the flyer are certainly possible, it is not unreasonable to read the flyer as expressing a viewpoint that disagrees with either homosexuality or issues that may concern homosexuals (i.e., gay marriage).

But if plaintiffs' contention is that the flyer is not outwardly discriminatory enough to cause likely disruption in the workplace, then the court must agree. Plaintiffs argue that the flyer does not implicate defendants' interests because plaintiffs are a peaceful group who have caused no actual disruption in the workplace. A government employer is entitled to restrict speech that it reasonably believes will disrupt the workplace and need not wait to "allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick*, 461 US at 152. The government employer, however, must make a "reasonable prediction" of disruption before it may restrict the speech. See *Moran*, 147 F3d at 846.

Plaintiffs' speech, while perhaps indicating disagreement with the message promoted by homosexual groups, does not seem the type of expression that would reasonably create workplace disruption. The flyer's indirect implication of plaintiffs' disapproval of homosexuality simply is not the

kind of blatant or offensive speech that on its face would cause disorder or controversy. Indeed, plaintiffs' flyer is quite different from other government employee speech about homosexuals that courts have found may be restricted. For instance, in *Greer*, the plaintiff firefighter "publicly excoriated [the fire chief] as a lesbian harboring 'radical agendas' and announced [the fire chief and another employee] to be 'homosexual women' despite the fact that neither had publicly declared their sexual orientation." *Greer*, 212 F3d at 372. The firefighter in *Greer* aggressively challenged the authority of the fire chief, made reckless statements regarding her sexual orientation and caused sensational news coverage in several newspapers. Further, the firefighter's remarks clearly referred to the fire chief's (alleged) sexual orientation and disparaged her on that basis. Such speech was both outwardly offensive, disrespectful and likely to create public controversy. By contrast, plaintiffs in this case have made no announcements to the general public, have used no openly derogatory terms about homosexuals and have not specifically targeted particular individuals.

Similarly, in *Lumpkin*, a clergyman who held a position on San Francisco's Human Rights Commission stated publicly that "[t]he homosexual lifestyle is an abomination against God" and that his religious beliefs included a passage from Leviticus that states that a man who sleeps with a man should be put to death. *Lumpkin*, 109 F3d at 1499. The Ninth Circuit, in holding that the mayor was free to remove this individual from the Human Rights Commission post, stated that "[a]s a private citizen, Reverend *Lumpkin* is perfectly free to preach vigorously and robustly that homosexuality is a sin. But he did not enjoy that same unrestrained freedom while he occupied the important and prestigious office of a Human Rights Commissioner." *Id* at 1501. As with *Greer*, the language employed by Reverend *Lumpkin* was inflammatory and directly condemned homosexuality. Such is not the case with plaintiffs' flyer. Additionally, the city of San Francisco had a

much stronger interest in removing an employee who espoused anti-gay sentiments when he occupied a leadership position on a human rights commission established to promote the interests of minority groups such as homosexuals. Here, plaintiffs' employment with the City simply is not in a comparable position.

Thus, the court's view is that the flyer, while implicating some disagreement with homosexuality, simply does not rise to the level necessary to make workplace disruption a likely event. Perhaps additional facts outside the pleadings would reveal a different story - perhaps the speech was accompanied by other more overt language, or perhaps grave workplace disruption actually resulted from plaintiffs' posting of the flyer. But those would be issues more appropriately resolved at summary judgment or trial. Considering no facts but those pled in the complaint and taking the allegations from that complaint as true, the court is not persuaded that the flyer is so patently offensive that it would cause disruption in the workplace. With respect to the flyer, therefore, this conclusion undermines most of the strong interests that defendants have in eliminating discrimination against homosexuals and preventing speech or behavior that would harass homosexuals.

Based on its analysis, the court is left with fairly weak ir terests on both sides: neither plaintiffs nor defendants have presented an especially compelling case. Defendants, however, have the burden of persuasion under the *Pickering/ Connick* balancing test. Given that defendants have not established particularly strong interests in restricting the speech in this case, the court must DENY the motion to dismiss directed to plaintiffs' Free Speech Clause claim based on the flyer.

b

Defendants also contend that any First Amendment facial challenge to the City's anti-discrimination policy should be

dismissed. The complaint appears to allege such a challenge, as it states that the policy "*sweep[s] within [its] ambit* protected First Amendment protection," "is unconstitutionally vague on its face" and "[does] not provide adequate notice of [its] scope [or] sufficient guidance for [its] application." Compl at 6 ¶ 31, 32, 35 (internal quotations omitted). Plaintiffs characterize this challenge as one that is based on vagueness. See Opp Mot Dism at 11:26-13:5. Invalidating a statute on such grounds is considered "strong medicine that has been employed by the [Supreme] Court sparingly and only as a last resort.'" *Nat'l Endowment for the Arts v Finley*, 524 US 569, 580 (1998), quoting *Broadrick v Oklahoma*, 413 US 601, 613 (1973). The standard for stating a claim under the doctrines of vagueness is correspondingly strict.

"[E]ven when a law implicates First Amendment rights, the constitution must tolerate a certain amount of vagueness." *California Teachers Ass'n v State Bd of Educ*, 271 F3d 1141, 1150-51 (9th Cir 2001). "Uncertainty at a statute's margins" is not enough to warrant facial invalidation if "it is clear what the statute proscribes in the vast majority of its intended applications.'" *Id* at 1151, quoting *Hill v Colorado*, 530 US 703, 733 (2000). Thus, in evaluating a facial challenge on the basis of vagueness, the court should determine whether "'citizens who desire to obey the statute will have * * * difficulty in understanding it * * *.'" *Kannisto v City & County of San Francisco*, 541 F2d 841, 845, quoting *Colten v Kentucky*, 407 US 104, 110 (1972). The court should also assess whether "a substantial amount of legitimate speech will be chilled." *California Teachers Ass'n*, 271 F3d at 1152.

As a preliminary matter, defendants assert that the complaint does not sufficiently state a claim for vagueness because it does not specifically identify the language in the policy that allegedly renders the policy void for vagueness. Mot Dism at 14:15-19. The only specific language plaintiffs use in reference to the policy is the word "homophobic,"

which appears only in the cover memorandum but not the actual policy itself. See Compl at ¶¶ 68, 69 and Exh 1 at 1. Because plaintiffs have not identified the language of the policy on which their vagueness challenge is based, the complaint fails to give defendants fair notice of the grounds for plaintiffs' claim. Accordingly, the void for vagueness claim should be dismissed on this ground alone.

Even assuming that plaintiffs have adequately stated a claim, the court finds that the policy is sufficiently clear that it is not susceptible to a facial challenge on vagueness grounds. The policy forbids, for example, "discrimination" and "harassment" based on an employee's protected status (race, gender, sexual orientation, religious affiliation, etc), as well as providing examples of unacceptable conduct. See Compl, Exh 1 at 4-11. Employees who desire to comply with the policy should have little trouble understanding what the terms contained in the policy mean. Additionally, because most employees will understand the common concepts articulated in the policy, the court cannot conclude that a *substantial* amount of legitimate speech would be chilled.

Other courts have upheld similar anti-discrimination policies in the face of vagueness challenges. In *Sypniewski v Warren Hills Reg'l Bd of Educ*, 307 F3d 243, 266 (3d Cir 2002), the Third Circuit found that, although words like "racially divisive" were imprecise, the challenged regulation still "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." The *Sypniewski* court also emphasized that because the challenged regulation was a school disciplinary rule, the court should be less demanding in considering the precision of the regulation's wording. *Id.* Likewise, the court here should be less demanding because the regulation applies to government employees, whose speech is subject to greater regulation by the government than is the speech of ordinary citizens.

Accordingly, the court GRANTS defendants' motion to dismiss as to plaintiffs' First Amendment facial challenge to defendants' anti-discrimination policy.

2

Defendants also argue that plaintiffs have failed to state a claim for violation of the First Amendment's right to peaceable assembly. Defendants contend that the claim should be dismissed because plaintiffs do not plead facts that would establish a substantial interference with plaintiffs' associational rights. Mot Dism at 11:3-8. To constitute a cognizable claim for a freedom of association violation, the interference with associational rights must be "'direct and substantial'" or "'significant.'" *Fighting Finest, Inc v Bratton*, 1996 US App LEXIS 28748, *8 (2d Cir), quoting *Lyng v UAW,* 485 US 360, 366 (1988). Thus, the government may engage in conduct "that incidentally inhibits protected forms of association." *Fighting Finest*, 1996 US App LEXIS 28748 at *8.

In *Fighting Finest*, the Second Circuit held that the government's decision to prohibit a police officers' boxing team from posting notices on police premises did not directly and substantially interfere with the team members' ability to exercise their right to freedom of association. *Id* at *9. A similar approach is warranted here. Plaintiffs do not allege any facts that would establish that defendants' decision not to allow plaintiffs to post advertisements on the work bulletin board substantially interfered with plaintiffs' ability to exercise their right to associate. Even if plaintiffs' allegations can be construed to mean that defendants' actions curtailed plaintiffs' ability to recruit new members from the workplace, such allegations are insufficient to establish a direct and substantial interference. Plaintiffs have pled no facts that would show that defendants prevented the group members from associating together or that defendants significantly burdened the members' ability to do so. *See id.*

Accordingly, the court GRANTS defendants' motion to dismiss plaintiffs' freedom of association claim.

3

Defendants next argue that plaintiffs' claim for violation of privacy should be dismissed. Defendants argue that plaintiffs fail to state a cognizable privacy claim because they fail to plead facts that would establish that defendants significantly intruded on plaintiffs' privacy rights. Mot Dism at 12:1-16. In *Griswold v Connecticut*, the seminal case recognizing a constitutional right to privacy, the Supreme Court stated that "the First Amendment has a penumbra where privacy is protected from *government intrusion.*" 381 US 479, 483 (1965) (emphasis added). Actions for such inappropriate government intrusion arise when plaintiff seeks to protect her interests in either "avoiding disclosure of personal matters * * * [or] independence in making certain kinds of important decisions" in matters regarding marriage, procreation, family relationships and child rearing. *Baron v Meloni*, 556 F Supp 796, 799-800 (WDNY 1983) (citing *Whalen v Roe*, 429 US 589, 598-600 (1977) and *Paul v Davis*, 424 US 693, 713 (1976)), aff'd, 779 F2d 36 (2d Cir 1985). To survive a motion to dismiss, the allegations of an invasion of a privacy interest must show "more than a trivial or incidental interference" with the privacy interest. *Scott v Kuhlmann*, 746 F2d 1377, 1378 (9th Cir 1984).

Plaintiffs have failed to allege any facts that would establish any sort of governmental intrusion. Further, plaintiffs have failed to allege any facts that would establish that any such governmental intrusion would affect an interest in either avoiding disclosure of personal matters or in making important decisions regarding marriage, procreation, family relationships or child rearing. As defendants put it, "[t]o the extent [p]laintiffs are alleging that [defendants] failed to *assist* them in exercising their right to association * * *, there is no authority to support such a claim" under the privacy

rubric. See Mot Dism at 12:8-11. Accordingly, the court GRANTS defendants' motion to dismiss plaintiffs' privacy claim.

4

Defendants next argue that plaintiffs' claim for a violation of the Free Exercise Clause of the First Amendment should be dismissed. The court agrees with defendants for several reasons. First, a free exercise claim must be premised on the impact of government action upon plaintiffs' "sincerely held 5 religious beliefs." *NLRB v Hanna Boys Center*, 940 F2d 1295, 7 1305-06 (9th Cir 1991). Such impact must constitute an undue 3 burden on the free exercise of such beliefs. *Hershinow v Bonamarte*, 735 F2d 264, 266 (7th Cir 1984). Plaintiffs do not allege that defendants interfered with their religious beliefs per se, but rather that defendants interfered with their ability to *express* their religious beliefs. See Compl at 9 ¶ 63. Without more facts that would establish how interference with expression unduly burdens their religious beliefs, plaintiffs' claim is insufficient as stated.

Second, "[t]he right of free exercise does not relieve 7 an individual of the obligation to comply with a valid and 3 neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religious prescribes) (or proscribes)." *Miller v Reed*, 176 F3d 1202, 1206 (9th Cir I 1999), quoting *Employment Division v Smith*, 494 US 872, 879 a (1990). Defendants' anti-discrimination policy is neutral and 3 generally applicable to all of defendants' employees at the 1 agency in question. See *Child Evangelism Fellowship*, 233 F Supp 5 2d at 665 (finding a restriction on the use of the school 5 bulletin board to be neutral and generally applicable because 7 its limitations were based on "legitimate pedagogical, 3 professional, or safety concerns," rather than religious criteria). Plaintiffs have alleged that the policy is not neutral because defendants have allowed other employees to post messages, and the allowance of such speech shows "an un-

lawful preference for human secularism and homosexual world views." Compl at 4 ¶ 20. But plaintiffs' complaint and attached exhibits do not demonstrate that other material concerning homosexuality was posted and that defendants failed to censor such material. Plaintiffs also repeatedly argue that the policy does not prevent religious discrimination, but this assertion is plainly false. The policy *expressly* protects employees from religious discrimination. Compl, Exh 1 at 5, 11-2. In short, plaintiffs present no basis for finding the policy not to be neutral and generally applicable.

Accordingly, the court GRANTS defendants' motion to dismiss plaintiffs' free exercise claim.

5

Defendants also argue that plaintiffs have failed to state a claim for a violation of the Due Process Clause of the Fourteenth Amendment. Plaintiffs' complaint, for all intents and purposes, appears to base this claim on the antidiscrimination policy's alleged vagueness. Such is the way that defendants construe the claim in their motion to dismiss. To the extent that the Due Process claim states such a cause of action, that claim is dismissed for the reasons articulated above in section II (B)(1)(b).

Plaintiffs, however, contend that defendants have misconstrued the Due Process claim. Instead, plaintiffs claim that defendants have violated their procedural due process rights by taking away plaintiffs' right to free speech and plaintiffs' flyer with no procedural protections. Opp Mot Dism at 14:3-26. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v Eldridge*, 424 US 319, 333 (1979), quoting *Armstrong v Manzo*, 380 US 545, 552 (1965). To state a procedural due process claim, plaintiffs must plead facts that establish: (1) the deprivation of a constitutionally protected liberty or property interest; and (2) the denial of

adequate procedural protections. *Brewster v Bd of Educ of Lynwood Unified School Dist*, 149 F3d 971, 982 (9th Cir 1998).

As an initial matter, as defendants point out in their reply brief, Reply Mot Dism (Doc # 19) at 8:1-13, plaintiffs' complaint is utterly devoid of factual allegations that support a procedural due process claim. Plaintiffs' factual allegations in its opposition brief cannot be incorporated by reference into their complaint. Plaintiffs' due process claim in no way provides fair notice to defendants and should be dismissed on this ground alone.

Even if the court considers plaintiffs' claim in light of the allegations plaintiffs attempt to incorporate through their opposition brief, the claim still must fail. Plaintiffs' claim is premised on the notion that "there is a fundamental right, which is as important as the right to own property." Opp Mot Dism at 14:13. Plaintiffs cite no authority for this proposition. While it may be true that fundamental rights are as important (or more so) than property, the court is reluctant to apply procedural due process analysis to the alleged deprivation of plaintiffs' "fundamental rights" in the absence of reliance on sound legal authority. In any case, plaintiffs' complaint fails to allege which "fundamental right" upon which their due process claim is based. Accordingly, plaintiffs' procedural due process claim based on their "fundamental rights" should be dismissed.

The only other possible basis for a procedural due process claim is the flyer, which plaintiffs assert is property within the meaning of the procedural due process rubric. "'Property interests * * * are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.'" *Brewster*, 149 F3d at 982, quoting *Board of Regents v*

Roth, 408 US 564, 577 (1972). The court doubts that plaintiffs could establish they retained a property interest in a flyer over which they relinquished control by posting on an office bulletin board. In any event, plaintiffs' complaint fails to allege facts that would establish that plaintiffs had a property interest in the flyer. Plaintiffs' procedural due process claim based on the "deprivation" of the flyer is therefore insufficient.

Accordingly, the court GRANTS defendants' motion to dismiss plaintiffs' due process claim as well.

6

Defendants next argue that plaintiffs' complaint fails to state a claim for violation of equal protection. Plaintiffs' complaint states that "[d]efendants have treated [p]laintiffs in a discriminatory and punitive way that is not applied to other groups and individuals wishing to engage in expressive activity." Compl at 10 ¶ 73. Plaintiffs contend in their opposition brief that they are members of a protected class based on their status as religious adherents. Opp Mot Dism at 15:1-3. In their complaint, however, plaintiffs do not allege that defendants' allegedly discriminatory treatment is based on or burdens plaintiffs based on their status as a protected class. Even if the complaint could be construed as giving fair notice that plaintiffs' equal protection claim is based on their status as religious adherents, plaintiffs' complaint fails to plead facts that demonstrate that the alleged discriminatory policy and treatment were based on religion. Plaintiffs assert that defendants "do not approve of the Christian beliefs, practices, and activities of [p]laintiffs" and "have taken an affirmative and explicit stance against the religious views of [p]laintiffs." Compl at 4-5 ¶ 18, 20. But the policy, which plaintiffs have attached to their complaint, contradicts any such bald assertions by plaintiffs that defendants' actions were based on religion. Rather, the cover memorandum to the policy makes clear that defendants' actions were premised on the perceived nature of plaintiffs' speech as homophobic. Plaintiffs plead

no facts that would substantiate their allegations that defendants were motivated by religion.

Plaintiffs also assert that defendants' policy violates their equal protection rights because it fails to provide protection against discrimination on the basis of religion. See Opp Mot Dism at 3:19-22, 15:3-6. But as the court has already stated, the policy explicitly protects religious adherents. Any equal protection claim on this basis is utterly devoid of merit. Additionally, to the extent that plaintiffs' equal protection claim is premised on differentiation between people who approve of homosexuality and people who do not, such a claim also fails to state that plaintiffs belong to a protected class. People who oppose homosexuality do not constitute a protected class. See *Okwedy v Molinari*, 150 F Supp 2d 508, 521 (EDNY 2001).

Plaintiffs have thus failed sufficiently to plead that they belong to a protected class or that the allegedly discriminatory policy was based on their status as members of a protected class. When "there is no allegation that the [policy] burdens a suspect class or a fundamental interest, [defendants] must demonstrate only that the classification scheme is 'rationally related to a legitimate state interest.'" *Hotel & Motel Ass'n of Oakland v City of Oakland*, 344 F3d 959, 970 (9th Cir 2003). If the government demonstrates that the policy is rationally related to a legitimate governmental purpose, then the policy will be upheld. *Green v City of Tuscon,* 340 F3d 891, 896 (9th Cir 2003).

Defendants have demonstrated that the antidiscrimination policy is rationally related to a legitimate governmental purpose. The anti-discrimination policy is designed to further "equal employment opportunity" and to ensure that all employees are free from harassment and discrimination. See Compl, Exh 1 at 4. Protecting employees from discrimination is a legitimate goal, especially in light of the fact that a "discriminatory and abusive work environment * * * can and

often will detract from employees' job performances, discourage employees from remaining on the job, or keep them from advancing in their careers." *Harris,* 510 US at 22. Moreover, the eradication of workplace discrimination against homosexuals *specifically* is a legitimate goal that is "entirely consistent with the goals and objectives of our civil rights statutes." *Peterson v Hewlett-Packard Co*, 2004 US App LEXIS 72, *9 (9th Cir).

Accordingly, the court GRANTS defendants' motion to dismiss plaintiffs' equal protection claim.

7

Defendants next move for dismissal of plaintiffs' Establishment Clause claim. Defendants first argue that the complaint fails to state a claim for an Establishment Clause violation because it does not allege government conduct that would constitute the establishment of religion. Mot Dism at 17:5-13. Before determining the validity of an Establishment Clause claim, the court should "first determine whether there is even an issue of establishment of religion." *Fleischfresser v Directors of School Dist* 200, 15 F3d 680, 687 (7th Cir 1994). An "allegation of some amorphous religion becomes so much speculation as to what some people might believe * * * [and] makes it difficult * * * to reconcile [plaintiffs'] claims with the purpose of the Establishment Clause." *Id* at 688. The only allegation in the complaint regarding the alleged religion established by defendants is that "[d]efendants have shown an unlawful preference for human secularism and homosexual world views." Compl at 4 ¶ 20. Not only is this allegation amorphous in the sense that the court intended in *Fleischfresser*, but it also fails to allege that "human secularism" and "homosexual world views" are forms of religion.

Even were this not enough to dismiss plaintiffs' claim, the test articulated in *Lemon v Kurtzman*, 403 US 602 (1971), would preclude plaintiffs from having stated a good claim.

When a policy is challenged under the Establishment Clause, the policy must: (1) have a secular purpose; (2) neither advance nor inhibit religion as its primary effect; and (3) not foster excessive government entanglement with religion. *Peloza v Capistrano Unified School Dist*, 37 F3d 517, 520 (9th Cir 1994) (citing *Lemon*, 403 US at 612-13). Under the first prong, to find a potential Establishment Clause violation, the court "must find that the action was 'motivated wholly by religious considerations.'" *Fleischfresser*, 14 F3d at 680, quoting *Lynch v Donnelly*, 465 US 668, 680 (1984). If the policy has a clear secular purpose, then plaintiffs' allegations otherwise are not material. See *Fleischfresser*, 15 F3d at 688. Because there is a clear secular purpose behind the anti-discrimination policy—preventing discrimination in the work-place—plaintiffs' claim is insufficient. As to the second prong, plaintiffs' claim must support the conclusion that defendants' action "amount[s] to an endorsement of religion." Id at 688. Plaintiffs' complaint nowhere contains facts that allege or support such a conclusion. Finally, to meet the third prong of the Lemon test, the complaint must allege facts that would establish that the government made inquiries into religious doctrine, delegated state power to a religious body or undertook detailed monitoring or close administrative contact with religious bodies. See *Hernandez v Commissioner of Internal Revenue*, 490 US 680, 696-97 (1989). Plaintiffs' complaint contains no such allegations.

Accordingly, the court GRANTS defendants' motion to dismiss plaintiffs' Establishment Clause claim.

8

Defendants also argue that plaintiffs' claim under the Fifth Amendment's Takings Clause should be dismissed. Plaintiffs premise their claim on the allegation that "[d]efendants impermissibly damaged the property of [p]laintiffs herein." Compl at 11 ¶ 80. The only reasonable way to interpret this allegation is that the property in question is the flyer that

defendants removed from the employee bulletin board. The court agrees with defendants that plaintiffs' Takings Clause claim should be dismissed for three reasons.

First, in order to qualify as an unconstitutional "taking," the government's alleged deprivation must have caused plaintiffs some pecuniary loss. See *Brown v Legal Foundation of Washington*, 538 US 216, 123 S Ct 1406, 1421 (2003). In this regard, the court should consider whether plaintiffs have any "distinct investment-backed expectations" that the governmental actions undermined. *Lucas v South Carolina Coastal Council*, 505 US 1003, 1019 n8. Plaintiffs have not alleged that defendants' actions in taking down the flyer have caused them any pecuniary loss, nor have plaintiffs alleged that they had any investment-backed expectations connected with the flyer.

Second, to state a good claim under the Takings Clause, plaintiffs must allege that they have a protected property interest. Property interests protected by the Takings Clause are not created by the Constitution but rather are defined by other independent sources like state law. *Ruckelshaus v Monsanto Co,* 467 US 986, 1001 (1984). Plaintiffs fail to allege any such basis that would establish that they had a property right in the flyer.

Third, in a physical takings case, "the property owner must have sought compensation for the alleged taking through available state procedures." *Daniel v County of Santa Barbara,* 288 F3d 375, 382 (9th Cir 2002). When plaintiffs fail to allege in their pleadings that they have pursued state administrative or judicial remedies, the takings claim is unripe for review. *Hotel & Motel Ass'n of Oakland*, 344 F3d at 966. Plaintiffs have failed to allege that they have sought out such state remedies.

For these reasons, plaintiffs' claim is insufficient, and the court accordingly GRANTS defendants' motion to dismiss plaintiffs' claim under the Takings Clause.

9

Defendants also contend that plaintiffs' complaint fails to state a claim for ultra vires action because defendants' actions were, as a matter of law, not ultra vires. Mot Dism at 20:14-21:7. An officer acts ultra vires only when he acts with no authority whatsoever. *Pennhurst State School & Hospital v Halderman*, 465 US 89, 101 n11 (1984). Defendants had the authority to remove the flyer under the anti-discrimination policy, which went into effect before plaintiffs posted the flyer. The policy requires that managers monitor the work-place to ensure that it is free from the discrimination the policy prohibits. Compl, Exh 1 at 14-15. This clearly gives defendants the authority to remove the flyer under the policy.

Moreover, plaintiffs cannot state an ultra vires claim on the basis that the policy was misapplied to their flyer. "[A]n ultra vires claim rests on 'the officer's lack of delegated power. A claim of error in the exercise of that power is therefore insufficient." *Pennhurst*, 465 US at 101 n11. To the extent that plaintiffs' ultra vires claim is premised on their allegation that defendants mistakenly characterized their flyer as "homophobic," such a claim is likewise insufficient.

Accordingly, the court GRANTS defendants' motion to dismiss plaintiffs' ultra vires claim.

10

Plaintiffs' final claim is for a violation of Article I § 4 of the California Constitution, a state law claim. That section of the California Constitution pertains to free exercise claims, and California courts have adopted the federal standard for free exercise claims in assessing state free exercise claims. See *Vernon v City of Los Angeles*, 27 F3d 1385, 1392 (9th Cir 1994); *Brunson v Dep't of Motor Vehicles*, 72 Cal App 4th 1251, 1255 (1999) (citing *Smith v California Fair Employment & Housing Comm'n*, 12 Cal 4th 1142 (1996)). Given that the court has dismissed plaintiffs' free exercise claims

under the federal constitution, plaintiffs' free exercise claims under the California constitution should also be dismissed. Thus, the court GRANTS defendants' motion to dismiss the California free exercise claim.

III

In sum, the court GRANTS defendants' Rule 41(b) motion to dismiss with respect to the City but DENIES the motion with respect to Hicks and Bobb (Doc # 25). The court DENIES defendants' Rule 12(b)(6) motion to dismiss (Doc # 13) as to plaintiff's Free Speech Clause claim. The court GRANTS defendants' Rule 12(b)(6) motion to dismiss (Doc # 13) as to the remainder of plaintiffs' claims. Those nine claims are accordingly DISMISSED.

IT IS SO ORDERED.

/s/
VAUGHN R WALKER
United States District Judge

APPENDIX E

Preserve Our Workplace With Integrity

Good News Employee Association is a forum for people of **Faith** to express their views on the contemporary issues of the day. With respect for the Natural Family, Marriage and Family values.

If you would like to be a part of preserving integrity in the Workplace call Regina Rederford @ 238-7534 or Robin Christy @ 238-6993.

Bulletin Board (this was removed on 1/3/03) RK

BEST AVAILABLE COPY

NEW YORK POST

WANTED

DEAD OR ALIVE

Osama bin Laden

For mass murder in New York City

000590

Except for ending
Slavery. Fascism.
Nazism. & Communism
WAR
HAS NEVER
SOLVED
ANYTHING

000591

Endorsed by US Representative Barbara Lee

EAST BAY!

Represent Yourself!

STOP War on Iraq War on us

Meet 10:30am
MOSSWOOD PARK
(MacArthur & Broadway, near Kaiser)
& MacArthur BART)

March 11:30am
TO FRANK OGAWA PLAZA
(14th & Broadway, 12th St. BART)

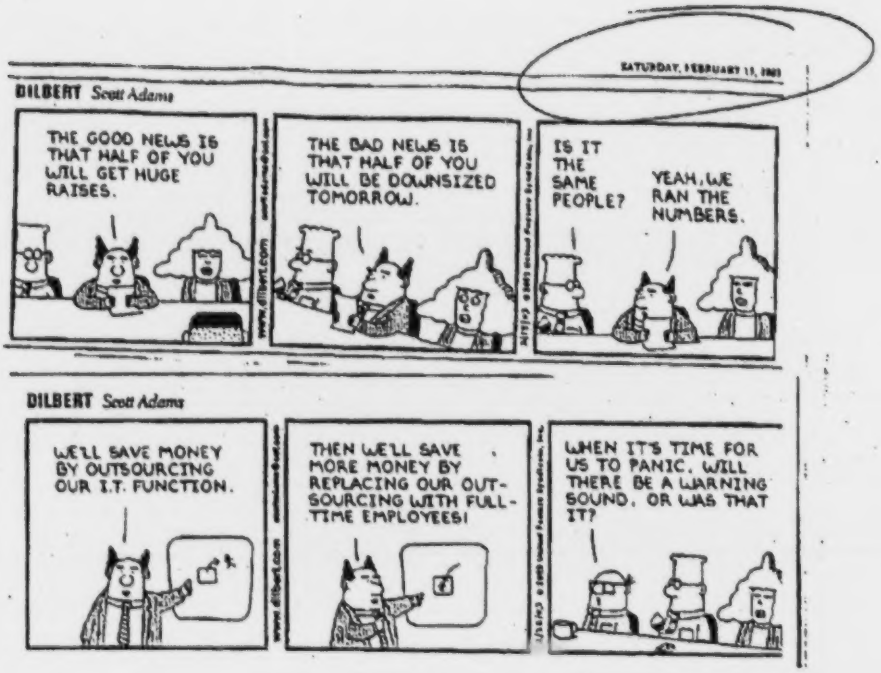
RALLY 1:30pm

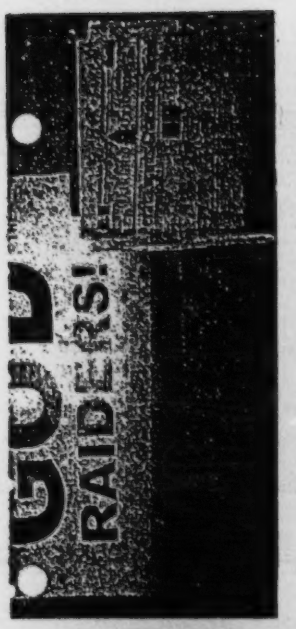
SATURDAY
April 5
OAKLAND

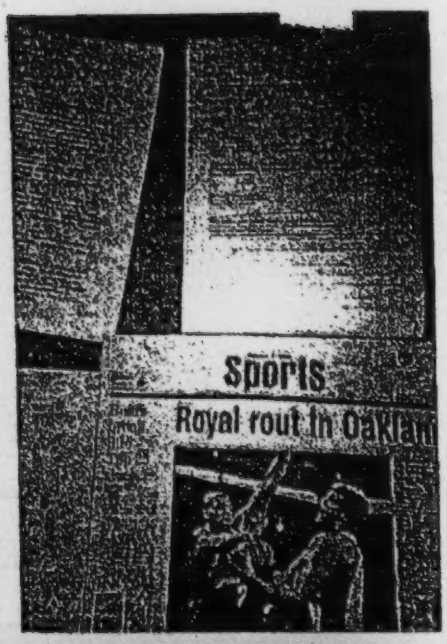
APRIL 5TH PEACE & JUSTICE COALITION
[illegible]

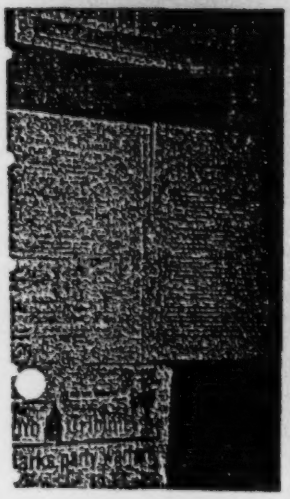
www.pmvrc.net 510-654-6966

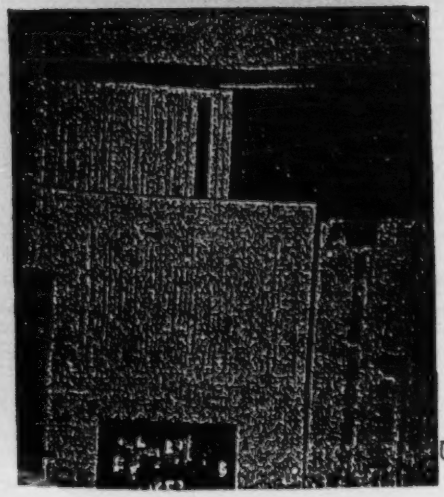
Books NOT Bombs • Jobs NOT Jails • Healthcare NOT Warfare • Rights NOT Racism


SATURDAY, FEBRUARY 15, 2003
DILBERT Scott Adams
THE GOOD NEWS IS THAT HALF OF YOU WILL GET HUGE RAISES.
THE BAD NEWS IS THAT HALF OF YOU WILL BE DOWNSIZED TOMORROW.
IS IT THE SAME PEOPLE?
YEAH, WE RAN THE NUMBERS.
DILBERT Scott Adams
WE'LL SAVE MONEY BY OUTSOURCING OUR I.T. FUNCTION.
THEN WE'LL SAVE MORE MONEY BY REPLACING OUR OUT-SOURCING WITH FULL-TIME EMPLOYEES!
WHEN IT'S TIME FOR US TO PANIC, WILL THERE BE A WARNING SOUND, OR WAS THAT IT?









J Scott 4/10/03 Return has a set of Pictures

000601

BEST AVAILABLE COPY

Martin Luther King, Jr. Rally

Monday, January 20, 2003

Join in a Multicultural Peace Celebration & Rally
10:30 a.m. at the ILWU Warehouse Union Hall
99 Hegenberger Road (at Pardee Drive) in Oakland

Celebrate with: The Brookfield Senior Center Choir
Medicine Warriors Dancers • All Nations Drum
Rev. Mark Clifton, East Oakland Church of God in Christ
Keynote: Oakland School Board President Greg Hodge on
"How would Dr. King respond to our current world situation?"
Father Jay Matthews, St. Benedict's Parish
A Representative from the Office of Congresswoman Barbara Lee
Youth Speakers include Jacar Reese, Javhan Cosby and representatives from EarthTeam.

Emcees: EBRPD Director Doug Siden & Former Oakland City Councilmember Carter Gilmore.

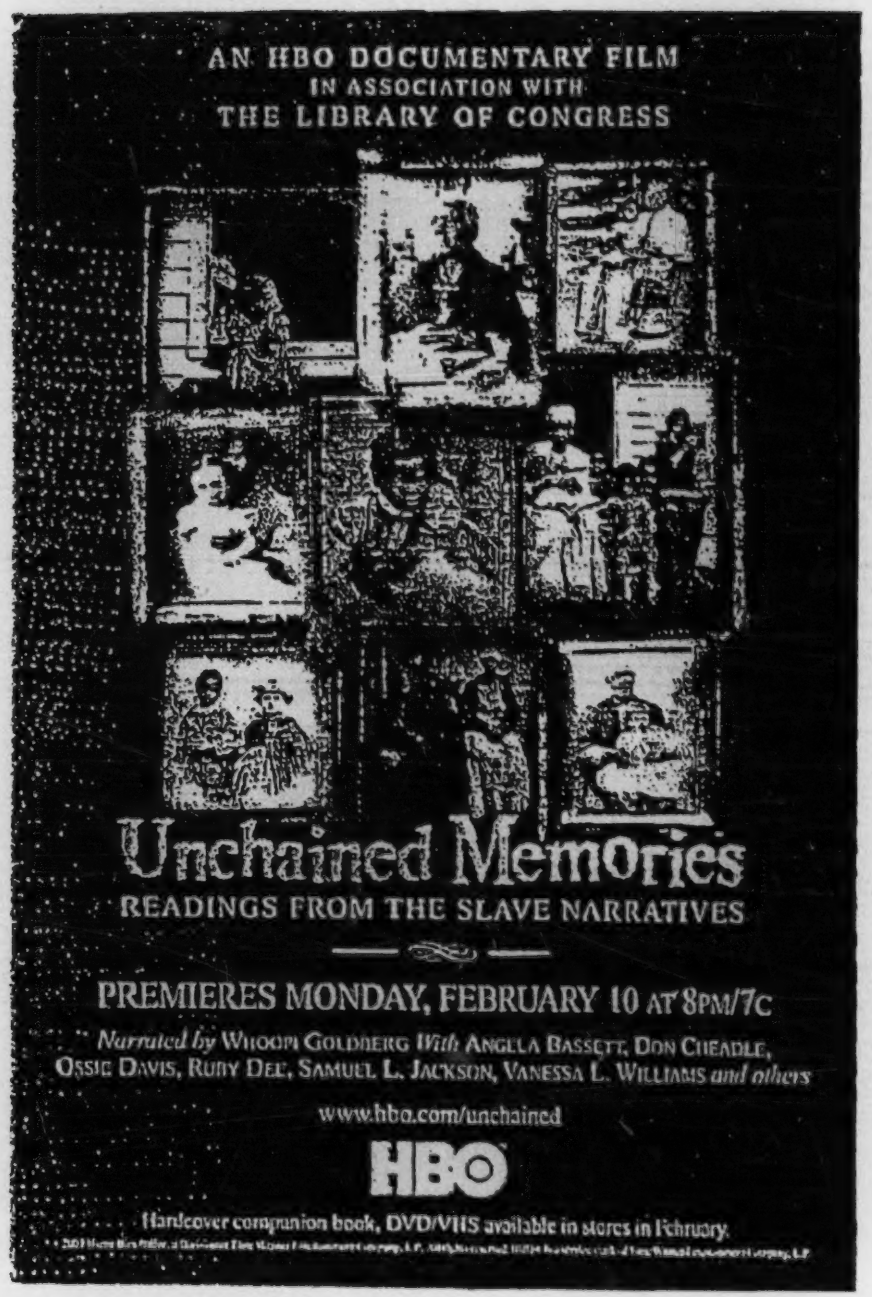
Endorsed by: The Alameda County Central Labor Council, Former State Assemblywoman Dion S. Aroner, Brookfield Athletic Advisory Council, State Assemblywoman Wilma Chan, Community Reformed Church, Earth Team, International Longshore and Warehouse Union - Warehouse Local, Alameda County Supervisor Alice Lai-Bitker, Congresswoman Barbara Lee, Alameda County Supervisor Nate Miley, Oakland City Council Member Larry Reid, Save the Bay, Oakland School Board Member Dan Siegel

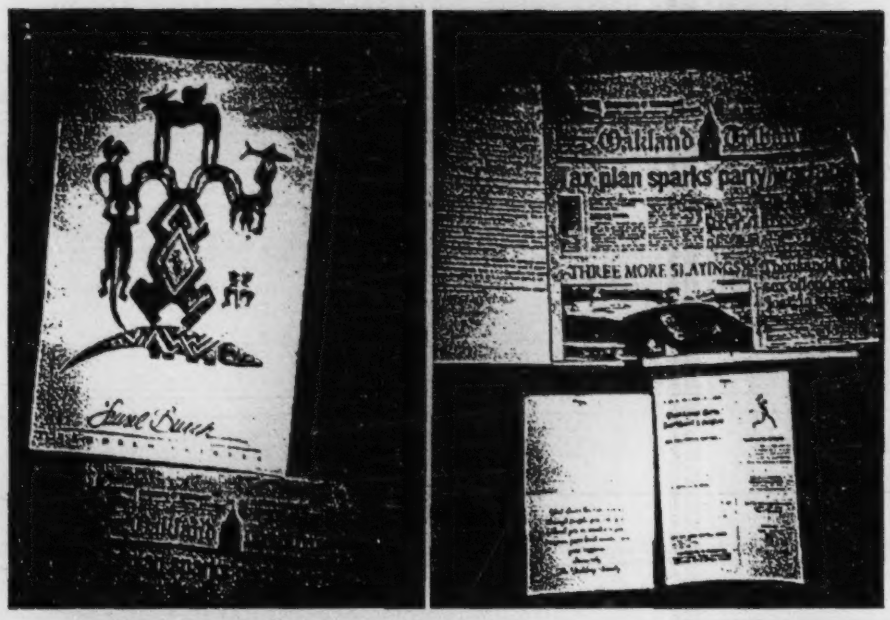
Sponsored by: The Martin Luther King, Jr. Rally Committee, the East Bay Regional Park District, The Martin Luther King, Jr. Freedom Center

PLEASE JOIN US AFTER THE RALLY AT A SPECIAL KING DAY SERVICE PROJECT FROM 1:00 - 3:00 PM: NATIVE PLANT RESTORATION IN MLK, JR. REGIONAL SHORELINE PARK!

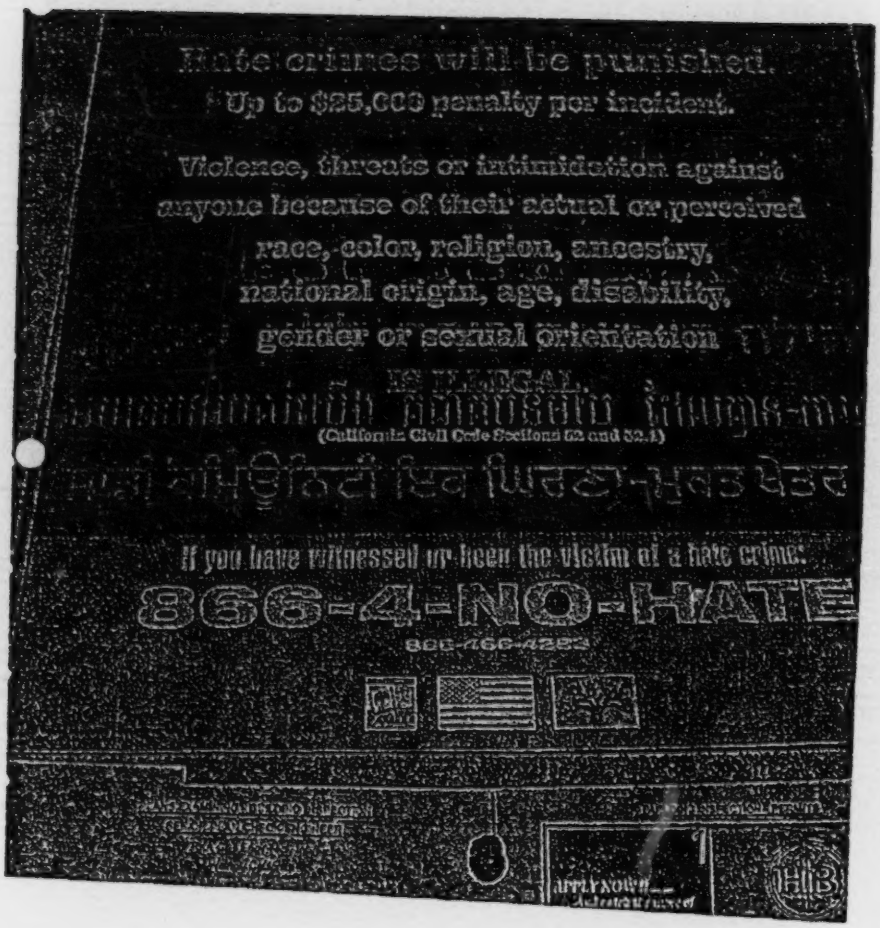
000602

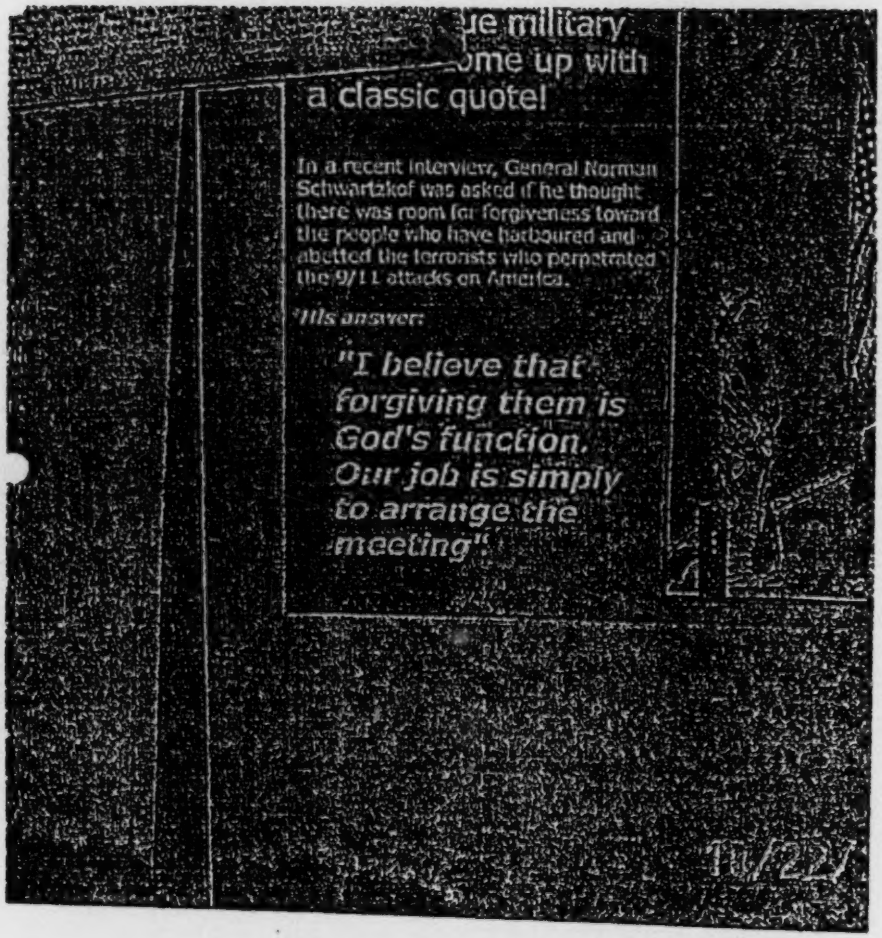
more information, please contact Mrs. Charlie Mae Davis, MLK, Jr. Rally Committee at (510) 638-0365 or Claire Greensfelder, MLK, Jr. Freedom Center at (510) 383-1087


AN HBO DOCUMENTARY FILM
IN ASSOCIATION WITH
THE LIBRARY OF CONGRESS
Unchained Memories
READINGS FROM THE SLAVE NARRATIVES
PREMIERES MONDAY, FEBRUARY 10 AT 8PM/7C
Narrated by WHOOPI GOLDBERG With ANGELA BASSETT, DON CHEADLE,
OSSIE DAVIS, RUBY DEE, SAMUEL L. JACKSON, VANESSA L. WILLIAMS and others
www.hbo.com/unchained
HBO
Hardcover companion book, DVD/VHS available in stores in February.


Laurel Burch
Oakland
tax plan sparks party
THREE MORE SLAYING

Sports
Royal rout in Oakla


Hate crimes will be punished.
Up to $25,000 penalty per incident.
Violence, threats or intimidation against
anyone because of their actual or perceived
race, color, religion, ancestry,
national origin, age, disability,
gender or sexual orientation
IS ILLEGAL.
(California Civil Code Sections 52 and 52.1)
If you have witnessed or been the victim of a hate crime:
866-4-NO-HATE
866-466-4283
HIB


ue military
ome up with
a classic quote!
In a recent interview, General Norman Schwartzkof was asked if he thought there was room for forgiveness toward the people who have harboured and abetted the terrorists who perpetrated the 9/11 attacks on America.
His answer:
"I believe that forgiving them is God's function. Our job is simply to arrange the meeting."
11/22

Rederford, Regina

From: Announcements
Sent: Wednesday, November 06, 2002 2:52 PM
To: Announcements
Subject: City of Oakland Gay-Straight Employee Alliance - Founding Meeting

all are invited to join us in the founding, establishing, conceiving and planning for
the City of Oakland Gay-Straight Employee Alliance

OUR FIRST MEETING WILL BE HELD ON THURSDAY, NOVEMBER 14th AT 5 p.m.
CITY HALL- HEARING ROOM 3

Pizza and drinks will be available

Exhibit 67
000610 76a

From: Announcements
Sent: Friday, November 15, 2002 11:39 AM
To: Announcements
Subject: City of Oakland Gay-Straight Employee Alliance/Candlelight Vigil for Peace and Tolerance

After an organizing meeting, the City of Oakland Gay-Straight Employee Alliance is pleased to announce its formation. Its purpose (yet to be formalized) will generally be to provide a interactive forum for employees who identify as and/or support gay/lesbian workers as an integral part of the City of Oakland work force. You are invited to future events of the Alliance, including a holiday luncheon in December. Please watch out for announcements.

The Alliance would also like to direct City Associates' attention to the following worthwhile event:

ENLIGHTEN EAST BAY CANDLELIGHT VIGIL FOR PEACE & TOLERANCE
FRIDAY NOVEMBER 15, 5-8PM
OGAWA PLAZA/OAKLAND CITY HALL

Inspirational speakers and music will take place in the amphitheatre directly in front of Oakland City Hall where candelarias representing the 25 transgender Americans murdered so far this year, a cascading rainbow of electric lights representing community pride, and searchlights streaking towards heaven representing all victims of hate crimes will provide a
beautiful setting for the event.

The purpose of the event is to provide an opportunity for the public to express it's rejection of hate speech and bigotry in a peaceful, non-confrontation way as well as provide an opportunity for local leaders to express their commitment to creating a more just and civil society.

The vigil takes place in the context of the brutal hate-crime murder of a transgender 17 year-old, Eddie (Gwen) Araujo in Newark, CA. Also Oakland's Bishop O'Dowd High School is presenting "The Laramie Project", portraying the killing of Matthew Shepard, a gay youth.

The Alliance urges you to attend.

From: Announcements
Sent: Wednesday, December 04, 2002 3:25 PM
To: Announcements
Subject: Gay-Straight Employee Alliance Holiday Mixer

City and Port of Oakland
Gay-Straight Employee Alliance

First Annual Holiday Mixer

Join Honorary Host Council Member Danny Wan
for an evening of food, fun and camaraderie

Wednesday, December 18, 2002
5:30 to 8:00 p.m.

Washington Inn
495 10th Street at Washington

Delicious Hors d'oeuvres will be Served

Please bring an unwrapped toy
for the Mayor's Holiday Toy Drive

NO HOST BAR

From: Wan, Danny
Sent: Friday, October 11, 2002 2:52 PM
To: Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mei'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

I would gaily join in celebrating National Coming Out Day. Count me in as part of the "knowing each other network".

Danny Wan
Oakland City Councilmember for
District 2
238-7002

-----Original Message-----
From: Announcements
Sent: Friday, October 11, 2002 1:22 PM
To: DL - Citywide; Cecilia Smock; Cheryl Wallace-Stanley; Deborah Acosta; Detra Cooley; Gregory C. Garrett; John Quintal; Lisa Talley Brown; Chan, Mei; Easley, Countess; Jackson, Sharon; Monetta, John; Petersen, Patricia; Sullivan, Margaret
Subject: Happy National Coming Out Day

HAPPY NATIONAL COMING OUT DAY

Dear City Staff:

I often hear that there are lots of gay workers in the City but I don't know that many. Perhaps you don't know that I am gay - I certainly participate in the silence. I would like to use National Coming Out Day to break that silence.

If anyone, gay or straight, would like to respond back to me or become part of a "knowing each other network", I would love to hear from you. I have attached the National Coming Out Day website.

<http://www.hrc.org/ncop/index.asp>

In unity,
Judith Silverman

Rederford, Regina

From: Williams, Carol
Sent: Monday, October 14, 2002 9:22 AM
To: Wan, Danny; Cappio, Claudia; Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mei'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

True this is a diverse city, so if what you are saying is correct then all of our religious organizations should be able to solicit city employees according to their beliefs, traditions and practices.

CWC

-----Original Message-----
From: Wan, Danny
Sent: Friday, October 11, 2002 6:19 PM
To: Williams, Carol; Cappio, Claudia; Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mei'; 'Easley, Countess'; 'Jackson, Sharon' 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

It is my understanding that part of the City's business is to celebrate diversity among City employees. Therefore, we do often get announcements of celebration of various cultures and celebration days. National Coming Out Day is a day of celebration of the Gay/Lesbian culture and movement. We should indeed celebrate as part of the City's business.

Danny Wan
Oakland City Councilmember for
District 2
238-7002

-----Original Message-----
From: Williams, Carol
Sent: Friday, October 11, 2002 5:53 PM
To: Cappio, Claudia; Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mei'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

According to Administrative Instruction #0140, e-mail should only be used for City business, this is not city business

-----Original Message-----
From: Cappio, Claudia
Sent: Friday, October 11, 2002 5:29 PM
To: Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mei'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

Well -- what a great idea --- count me in and happy coming out day to all as well. Thanks for making the leap. Regards, Claudia

-----Original Message-----
From: Announcements
Sent: Friday, October 11, 2002 1:22 PM
To: DL - Citywide; Cecilia Smock; Cheryl Wallace-Stanley; Deborah Acosta; Detra Cooley; Gregory C. Garrett; John Quintal; Lisa Talley Brown; Chan, Mei; Easley, Countess; Jackson, Sharon; Monetta, John; Petersen, Patricia; Sullivan, Margaret
Subject: Happy National Coming Out Day

000614

80a

Christy, Robin

From: Williams, Carol
Sent: Monday, October 14, 2002 9:32 AM
To: Vose, Charles; Wan, Danny; Cappio, Claudia; Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mel'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

It was not religious, but we are not talking about religion per say we are talking about diversity.

-----Original Message-----
From: Vose, Charles
Sent: Monday, October 14, 2002 9:26 AM
To: Williams, Carol; Wan, Danny; Cappio, Claudia; Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mel'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

I don't believe this was a RELIGIOUS announcement, but instead an announcement that is similar to ones numerous other groups in the city send out routinely (as others have already pointed out). It is interesting that it was THIS one over which this issue was raised.

Charles Vose

-----Original Message-----
From: Williams, Carol
Sent: Monday, October 14, 2002 9:22 AM
To: Wan, Danny; Cappio, Claudia; Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mel'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

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CWC

-----Original Message-----
From: Wan, Danny
Sent: Friday, October 11, 2002 6:19 PM
To: Williams, Carol; Cappio, Claudia; Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mel'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

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Danny Wan
Oakland City Councilmember for
District 2
238-7002

-----Original Message-----
From: Williams, Carol
Sent: Friday, October 11, 2002 5:53 PM
To: Cappio, Claudia; Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mel'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

Christy, Robin

From: Ojukwu, Odili
Sent: Monday, October 14, 2002 9:31 AM
To: Nguyen, Alex; Williams, Carol; Cappio, Claudia; Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mei'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

The interesting thing here is not whether this is the first or the umpteenth time AI #0140 is cited but the appropriateness of use of the city e-mail system.

-----Original Message-----
From: Nguyen, Alex
Sent: Monday, October 14, 2002 9:16 AM
To: Williams, Carol; Cappio, Claudia; Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mei'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

This is interesting. I have seen many, many such celebration announcements come across the city e-mail system, and this is the FIRST time anyone has ever claimed AI #0140 ! ! !

-----Original Message-----
From: Williams, Carol
Sent: Friday, October 11, 2002 5:53 PM
To: Cappio, Claudia; Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mei'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

According to Administrative Instruction #0140, e-mail should only be used for City business, this is not city business

-----Original Message-----
From: Cappio, Claudia
Sent: Friday, October 11, 2002 5:29 PM
To: Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mei'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

Well — what a great idea — count me in and happy coming out day to all as well. Thanks for making the leap. Regards, Claudia

-----Original Message-----
From: Announcements
Sent: Friday, October 11, 2002 1:22 PM
To: DL - Citywide; Cecilia Smock; Cheryl Wallace-Stanley; Deborah Acosta; Detra Cooley; Gregory C. Garrett; John Quintal; Lisa Talley Brown; Chan, Mei; Easley, Countess; Jackson, Sharon; Monetta, John; Petersen, Patricia; Sullivan, Margaret
Subject: Happy National Coming Out Day

HAPPY NATIONAL COMING OUT DAY

Dear City Staff:

000616

82a

From: Cappio, Claudia
Sent: Friday, October 11, 2002 5:29 PM
To: Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mel'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

Well --- what a great idea --- count me in and happy coming out day to all as well. Thanks for making the leap.
Regards, Claudia

-----Original Message-----
From: Announcements
Sent: Friday, October 11, 2002 1:22 PM
To: DL - Citywide; Cecilia Smock; Cheryl Wallace-Stanley; Deborah Acosta; Detra Cooley; Gregory C. Garrett; John Quintal; Lisa Talley Brown; Chan, Mel; Easley, Countess; Jackson, Sharon; Monetta, John; Petersen, Patricia; Sullivan, Margaret
Subject: Happy National Coming Out Day

HAPPY NATIONAL COMING OUT DAY

Dear City Staff:

I often hear that there are lots of gay workers in the City but I don't know that many. Perhaps you don't know that I am gay - I certainly participate in the silence. I would like to use National Coming Out Day to break that silence.

If anyone, gay or straight, would like to respond back to me or become part of a "knowing each other network", I would love to hear from you. I have attached the National Coming Out Day website.

<http://www.hrc.org/ncop/index.asp>

In unity,
Judith Silverman

I often hear that there are lots of gay workers in the City but I don't know that many. Perhaps you don't know that I am gay - I certainly participate in the silence. I would like to use National Coming Out Day to break that silence.

If anyone, gay or straight, would like to respond back to me or become part of a "knowing each other network", I would love to hear from you. I have attached the National Coming Out Day website.

<http://www.hrc.org/ncop/index.asp>

In unity,
Judith Silverman

BEST AVAILABLE COPY

85a

From: Parker, Robynn
Sent: Tuesday, October 15, 2002 4:28 PM
To: Rederford, Regina
Subject: FW: Happy National Coming Out Day

-----Original Message-----
From: Robinson, Deborah
Sent: Tuesday, October 15, 2002 4:18 PM
To: Parker, Robynn; ~~Williams, Carol~~
Subject: FW: Happy National Coming Out Day

anti Gay Prejudice

Deborah A. Robinson
City of Oakland
CEDA Building Services
250 Frank H. Ogawa Plaza, Rm. 2340
Oakland, CA 94612
(510) 238-4788
(510) 637-0396 (Fax)

-----Original Message-----
From: Nadel, Nancy
Sent: Tuesday, October 15, 2002 3:54 PM
Subject: RE: Happy National Coming Out Day

Dear Ms. Robinson,

As long as people are killed for their sexual identity (remember Laramie?), it is important that we assure gay and lesbian people their right to have pride in who they are, just as we recognize that right for women, children, people of different religions, people from other countries, and people of color. Years ago I had an employee who was beaten in the streets of Oakland for being gay. Children in Oakland schools are harassed for being gay. I understand that this is a difficult concept for some who feel the Bible teaches them that sexual identity as a gay or lesbian is wrong. The Bible also says "slaves obey your master" and "women obey your husbands." I personally think the good book needs some updating. Thirty-five years ago, I worked at Bellevue Psychiatric Hospital in New York City. At that time, people who identified as gay were considered mentally ill and their families could commit them to a mental hospital on those grounds. The psychiatric profession has since seen the light. I think it is time for the rest of the world to catch up.

There is a national day for those who accept Christ as their personal savior - it's called Christmas and it's a city, national and worldwide holiday. Those of us who are not Christian are forced to observe it. We cannot take excused time off instead for our own holidays. There is frequent reference to Christmas in city emails. I just received one this week about a choir. Frequently a minister comes and prays at open forum of city council meetings, mentioning Jesus' name. OCO members come to have meetings with me in city hall starting and ending their meetings with a Christian prayer despite my not being Christian. I live with it. I respect the religion of others.

People who are gay and lesbian in this city and specifically in this city government have told me they feel threatened and unsafe for being who they are. It is not a choice, it is who they are. That kind of environment at the workplace, in our city is unacceptable to me as an individual and to the city - it is counter to our non-discrimination policy. National Coming Out Day clearly has brought some light on anti-gay prejudice in this city and city government. We all owe ur colleagues the right to feel pride in themselves if they are gay, to be able to identify publicly if it makes them feel less ghtened about being who they are - that's step one for local selflessness. It takes nothing away from the tragedies

around the world but instead points to the importance of stopping prejudice everywhere, early, no matter where it is, no matter whom it is against.

Sincerely,

Nancy Nadel

-----Original Message-----
From: Robinson, Deborah
Sent: Tuesday, October 15, 2002 2:50 PM
To: Nadel, Nancy; Williams, Carol; Cappio, Claudia; Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Debra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mei'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

What is the value in sharing this information with everyone? Most people in general don't base relationships on that one particular subject. There are just some things that are not as important as you may think to all.

When children, men and women are killed daily in this world, most of the time your sexuality has no bearing. Take for instance the sniper in the Washington D.C. area. Now, if the sniper were targeting gays or heterosexuals, would you be so ready to release information to everyone? Is it really needed information? I don't know you personally, and if I didn't I promise you your sexuality would not be a criteria used in judging you as a person. I may use the measuring stick of character and integrity. How about a National Integrity and Good Character Day. And guess what neither requires the knowledge of your personal sexual his - story.

What happens in the privacy of your home or wherever, is between you and those involved.
This e-mail just made me wonder why so much attention is needed pertaining to this particular subject?
Your sexuality and religion (just to name a few) are your own business and does nothing at all for most.

Is being STRAIGHT something that is advertised by parades and parties? Those who except Christ as their personal Savior, should there be a National Day for that as well? No, it's your business. Some things need not to be shared with EVERYONE

I wouldn't mine hearing or reading about your edifying or lifting one up when a kind word or encouragement is needed, or giving of yourself in ways that are meaningful during this period in our lives, now that would be worth sharing. Lets not be so self-centered and self involved and try some self - less -ness.

Deborah A. Robinson
City of Oakland

-----Original Message-----
From: Nadel, Nancy
Sent: Friday, October 11, 2002 6:12 PM
To: Williams, Carol; Cappio, Claudia; Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Debra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mei'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

Dear Carol,

While I am not gay and I appreciate your admonition, I believe it is also a policy of the city not to discriminate on the basis of sexual identity. Understanding people's sexual identity is the first step to becoming sensitive enough to not discriminate. Respecting ourselves and our colleagues is very much city business.

Nancy Nadel

-----Original Message-----

C00621 868

Christy, Robin

From: Announcements
Sent: Monday, October 14, 2002 12:55 PM
To: DL - Citywide; Cecilia Smock; Cheryl Wallace-Stanley; Deborah Acosta; Detra Cooley; Gregory C. Garrett; John Quintal; Lisa Talley Brown; Chan, Mei; Easley, Countess; Jackson, Sharon; Monetta, John; Petersen, Patricia; Sullivan, Margaret
Subject: Amigos "Dia de los Muertos" Altar Exhibition

Amigos, the City of Oakland Chicano/Latino Employees Association, invites you to participate and view the "Dia de los Muertos" Altar Exhibition located in the lobby of 250 Frank Ogawa Plaza from October 21-November 1, 2002. The community altar is made of up of photos, visual representations and memorial information of friends, co-workers, and family members who have passed away. A separate altar will also focus on Oakland police officers who have died in service to the community. A reception will be held at the same location on October 24, 2002 from 4:30 p.m.-5:30 p.m. For more information please contact Juanita Meza Velasquez at (510) 238-6680 or jmvelasquez@oaklandnet.com <mailto:jmvelasquez@oaklandnet.com>.

Christy, Robin

From: Announcements
Sent: Thursday, October 10, 2002 3:27 PM
To: DL - Citywide; Cecilia Smock; Cheryl Wallace-Stanley; Deborah Acosta; Detra Cooley; Gregory C. Garrett; John Quintal; Lisa Talley Brown; Chan, Mei; Easley, Countess; Jackson, Sharon; Monetta, John; Petersen, Patricia; Sullivan, Margaret
Subject: Free Lunchtime Dance Concert Celebrating Oakland History

Nina Haft & Company Presents:
EVERYONE THEN COMES SOMETIME: A Free Lunchtime Dance Concert Celebrating Oakland History

Please join us on this Friday, October 11th for a free outdoor dance concert celebrating 150 years of Jewish history and culture in downtown Oakland. This short program of dances by Oakland-based Nina Haft & Company is inspired by subjects ranging from casino racketeering to Oakland author Gertrude Stein's essays about world war.

The concert takes place on Friday, October 11th, 2002 at 12:15pm in the Oakland City Hall Amphitheater at 1 Frank H. Ogawa Plaza, near the corner of 14th Street and Broadway.

Everyone Then Comes Sometime is an official event of "Celebrating 150 Years of Oakland," and is co-sponsored by the City of Oakland Community and Economic Development Agency and the Craft & Cultural Arts Department.

Grab your lunch and enjoy the dance!

000623
88a

Rederford, Regina

From: Announcements
Sent: Tuesday, March 25, 2003 4:39 PM
To: Announcements
Subject: Teach-in on the War with Iraq

TO: Friends
FROM: Oakland City Councilmember Jane Brunner
RE: Iraq Teach-In in Oakland

Oakland City Councilmember Jane Brunner invites you to a teach-in on the war on Iraq and the implications for the Middle East, to be held Monday, March 31st at 7:00pm in the Oakland City Council Chambers at Oakland City Hall. This is the first anti-Iraq War teach-in sponsored by a city government anywhere in the U.S.

Councilmember Brunner will moderate a panel of experts to discuss the circumstances leading up to the conflict with Iraq and to explore the ramifications of war for the people of Iraq, the Middle East and for Americans here at home.

Why are we so deeply involved in Iraq and how did we get there? How is the war in Iraq related to the broader situation in the Middle East? How will the cost of the war be felt here at home? These and many other questions will be explored by the assembled panel:

Rev. Dr. Vernon Burroughs, St Paul's African Methodist Episcopal Church, Berkeley, CA

Reese Erlich, Foreign Correspondent and Author of "Target Iraq: What the News Media Didn't Tell You"

Marcia Freedman, Former Member of the Israeli Knesset; President, Jewish Alliance for Justice and Peace

Favianna Rodriguez, political artist, youth organizer and Founder, East Side Arts Alliance, Oakland

Robert Scheer, Syndicated Political Columnist (*LA Times*, *SF Chronicle*, *The Nation* magazine)

Stephen Zunes, Associate Professor and Coordinator of the Peace and Justice Studies Program, University of San Francisco

Please join Councilmember Brunner, Council President Ignacio de la Fuente and Mayor Jerry Brown in supporting this teach-in and calling for an evening of discussion on the war in Iraq.

If you have any questions or would like any further information, please contact Councilmember Brunner's office at 238-7001.

City Hall is located a half-a-block below Broadway on 14th Street in downtown Oakland.

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(3)

No. 06-1619

Supreme Court, U.S.
FILED
JUL 6 - 2007
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GOOD NEWS EMPLOYEE ASSOCIATION,
REGINA REDERFORD, ROBIN CHRISTY,
Petitioners,

v.

JOYCE M. HICKS, in her individual and official capacities as Deputy Executive Director of the Community and Economic Development Agency of the City of Oakland, ROBERT C. BOBB, in his individual and official capacities as City Manager of the City of Oakland.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF THE PETITIONERS PETITION FOR A WRIT OF CERTIORARI

PETER J. FERRARA *
American Civil Rights Union
Suite#960
1600 Wilson Blvd
Arlington, VA 22209
703-582-8466

* Counsel of Record

Counsel for *Amicus Curiae*
American Civil Rights Union

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF THE AMICUS CURIAE[1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all constitutional rights, not just those that might be politically correct for a time or fit a particular ideology. It was founded by former Reagan Senior White House Policy Advisor Robert B. Carleson in 1998, and since then has filed *amicus curiae* briefs on constitutional law issues in cases all over the country.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese III; former Federal Appeals Court Judge and Solicitor General Robert H. Bork; Pepperdine Law School Dean Kenneth W. Starr; former Assistant Attorney General for Civil Rights William Bradford Reynolds; Walter E. Williams, John M. Olin Distinguished Professor of Economics at George Mason University; former Harvard University Professor, Dr. James Q. Wilson; Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

This is exactly the kind of case that is of interest to the ACRU because we want to ensure that the constitutional rights of Christians and others who want to express and uphold traditional moral values are fully recognized and protected, and not minimized or overlooked because of political correctness or ideological bias.

All parties have consented to the filing of this brief.

---

[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. The letters of consent to the filing of this brief have been enclosed.

INTRODUCTION

We urge the Court to grant the requested Writ of Certiorari because this case presents increasingly urgent questions of law regarding the free speech rights of politically disfavored local minorities. The facts of this case reveal discriminatory prejudice against Christian employees by the City of Oakland reflected in viewpoint discrimination regarding their freedom of speech.

Moreover, this is not an isolated case. These issues are increasingly important because similar discriminatory prejudice is now exhibited in more and more local government jurisdictions across the country where there is no serious political competition, and the majority increasingly tramples on the rights of minorities that hold politically disfavored, incorrect views. More and more across America, those who espouse traditional moral values in banal, innocent terms, such as in this case, are being told they have engaged in unlawful discrimination and hate speech, and are being punished for it.

Under the rulings of the courts below, use of the words "natural family", "marriage", and "family values" in regard to public policy issues concerning homosexuality constitutes homophobic hate speech and grounds for dismissal of public employees. This precedent affects the speech not only of the plaintiffs in this action, but of every public employee. Indeed, if this language is now legally homophobic hate speech, that determination can serve as the basis for liability under various anti-discrimination laws for all citizens.

The end result is that freedom of speech is restricted for everyone who wants to advance or speak in favor of traditional moral values.

STATEMENT OF THE CASE

As the District Court stated, "The facts are not in material dispute." App. 7a. This case involves two African-American, Christian females employed in the Community and Economic Development Agency ("CEDA") of the City of Oakland. App. 27a. They observed that employee organizations were allowed to use the City's employee email system and bulletin boards to promote their activities, viewpoints and values. App. 27a-28a; 66a-89a. This included the Gay Straight Employee Alliance, which aggressively promoted its views regarding gay sex, homosexual marriage, and other issues. Among other activities, the Alliance sponsored "Happy Coming Out Day", which stimulated discussions in the work place regarding personal sexual practices. App. 27a, 76a-87a.

A broad range of issues and viewpoints were exhibited on the employee email system and bulletin boards. One email criticized Christians and the Bible, stating, "I understand that this is a difficult concept for some who feel the Bible teaches them that sexual identity as a gay or lesbian is wrong. The Bible also says "slaves obey your master" and "women obey your husbands". I personally think the good book needs some updating." App. 85a.

Another email communication announced "the first anti-Iraq War teach in sponsored by a city government anywhere in the U.S." App. 89a. A flyer posted on City bulletin boards announced another rally saying, "STOP War on Iraq, War on us". It called for "Books NOT Bombs, Jobs NOT Jails, Healthcare NOT Warfare, Rights NOT Racism." App. 68a. Other postings on the email system or bulletin boards discussed war and peace, racism, slavery, communism, Osama bin Laden, personal sexuality, sports, Jewish cultural events, Hispanic cultural events, and the first

annual holiday mixer of the Gay Straight Employee Alliance. App. 66a-89a.

Based on their Christian values, CEDA employees Robin Christy and Regina Rederford often did not agree with the email and bulletin board postings of other employees. But instead of complaining to restrict the freedom of others, they formed their own employee organization, the Good News Employee Association, which met regularly to pray and discuss their Christian perspectives on the major issues of the day.

Christy and Rederford were shocked when they were denied the same access to the employee email system for their announcements as other employee organizations. App. 27a, 41a. This reflected the hostility to their Christian values in the City bureaucracy. App. 27a. 28a.

So, in November, 2003, Christy and Rederford proceeded to post a bulletin board notice regarding their organization that read as follows:

"Preserve Our Workplace With Integrity.

"Good News Employee Association is a forum for people of Faith to express their views on the contemporary issues of the day. With respect for the Natural Family, Marriage and Family Values,

"If you would like to be a part of preserving integrity in the workplace call Regina Rederford ...or Robin Christy...."

App. 65a.

The group referenced the need to preserve integrity in the workplace because of the discrimination it had already suffered in being denied access to the employee email system

while this was routinely allowed for all other employee groups, including a homosexual advocacy group with opposing views. App. 41a.

City officials responded to the posted notice first by removing and confiscating it on January 3, 2004. Then, on February 20, 2004, City officials issued Administrative Instruction 71 ("AI 71"), which announced adoption of an anti-discrimination/non-harassment policy regarding employee conduct in the workplace, effective January 1, 2004. App. 28a. A letter accompanying the policy by Defendant Joyce Hicks, Deputy Director of CEDA, stated,

> "We have recently had incidents in our agency where staff has inappropriately posted materials that are in violation of AI 71. Specifically flyers were placed in public view which contained statements of a homophobic nature and were determined to promote sexual orientation based harassment. [...] Failure to comply with the directives in AI 71 and 140 will include disciplinary action up to and including termination."

App. 8a, 10a, 28a-29a

Everyone realized that this statement referred to the posted notice by Rederford and Christy. The words "of a homophobic nature" that "were determined to promote sexual orientation based harassment" were "Natural Family, Marriage, and Family Values." Hicks' letter clearly indicates that use of these words violates AI 71 and is subject to the sanction of termination. The letter also clearly indicates that if Rederford and Christy continued to use such language they would be terminated.

There were no special circumstances that made the use of the words in this case uniquely objectionable. Indeed, the District Court below stated,

> "[P]laintiffs' speech was not accompanied by anything that would have exacerbated its effects in the workplace. For example, the speech was not explicitly threatening nor expressly directed toward a particular employee or group of employees. Instead, the flyer was merely posted on the bulletin board, along with all the rest of the notices."

App. 47a.

The District Court also said,

> "Plaintiffs' speech, while perhaps indicating disagreement with the message promoted by homosexual groups, does not seem the type of expression that would reasonably create workplace disruption. The flyer's indirect implication of plaintiffs' disapproval of homosexuality simply is not the kind of blatant or offensive speech that on its face would cause disorder or controversy. Indeed, plaintiffs' flyer is quite different from other government employee speech about homosexuals that courts have found may be restricted....[P]laintiffs in this case have made no announcements to the general public, have used no openly derogatory terms about homosexuals and have not specifically targeted particular individuals."

App. 48a-49a.

What the District Court did find damning, however, were these further expressions of traditional moral values and

standard Christian doctrine, which were not included in the flyer:

> "In its 'statement of faith', GNEA explains that 'we believe the Natural Family is defined as a man and a woman, their children by birth or adoption, or the surviving remnant thereof (including single parents)'; that '[w]e believe Marriage is defined by a union between a man and a woman according to California state law'; and that '[w]e believe in Family Values that promote abstinence, marriage, fidelity in marriage and devotion to our children.'"

App. 7a. The District Court considered this language critical evidence of the "anti-homosexual import" of the use of the words Natural Family, Marriage, and Family Values.

In other words, when Christians or others who believe in traditional moral values use these words, the communication involves anti-homosexual discrimination and hate speech. This case consequently becomes a shocking precedent for limiting the free speech rights of Christians and other advocates of traditional moral values, and for punishing them for expression and advocacy of those Christian beliefs and traditional values, under anti-discrimination laws. The precedent would not even be limited to public employees, as the ruling would bear on use of these words by others who hold to Christian and traditional moral values and whether their expression indicated violations of anti-discrimination prohibitions.

In response to these actions by City officials, Plaintiffs Christy and Redeford filed this suit against the City of Oakland, Robert C. Bobb, City Manager of the City of Oakland, and Joyce. M. Hicks, Deputy Executive Director of CEDA. The District Court dismissed several causes of action in the original suit for failure to state a claim. It

dismissed the City of Oakland from the case because of failure of the Plaintiffs to serve the City and failure to prosecute. In a later opinion, the District Court granted summary judgment dismissing Plaintiffs' claim against Hicks and Bobb for violation of Plaintiffs' First Amendment free speech rights. The Ninth Circuit affirmed these rulings

SUMMARY OF ARGUMENT

Once Oakland City officials allowed employees to use the City email system and bulletin boards for personal political and social postings, they could not engage in viewpoint discrimination. Yet, the City's treatment of GNEA and the employees behind it clearly involved the most blatant viewpoint discrimination.

While the City has a compelling state interest in stopping discriminatory communications and hate speech, the traditional Christian doctrines and moral values included in GNEA's communications cannot remotely be characterized as involving such discrimination and hate speech. Quite to the contrary, advocacy of these Christian, traditional moral values is constitutionally protected by both the Freedom of Religion and Free Speech Clauses. Once City officials allow other employees to advance their social, moral and political values in the workplace, the officials are constitutionally required to permit advocacy of Christian, traditional moral values on equal terms as well.

There is no legal authority or justification for viewpoint discrimination even in the public employee workplace. Moreover, in any event, a broad range of controversial political, religious, and social topics were raised by employees on the City's email system and bulletin boards. If the City did not find that these communications disrupted the workplace, then it cannot claim that the

innocent expression of widely held traditional moral values by GNEA disrupted the workplace. Indeed, as a factual matter, there was no significant disruption in the workplace as a result of GNEA's communications. Consequently, the City's legitimate administrative interest in avoiding workplace disruption could not outweigh the constitutionally protected employee interest in free speech.

The importance of this case goes far beyond the free speech rights of the public employees in this case, or even of public employees in general. Increasingly across America, private organizations and individuals that advance and uphold traditional moral values and Christian doctrine are being told by government officials that such conduct violates anti-discrimination laws. This is then used as a basis for denying these organizations and individuals use of public facilities or participation in government programs or receipt of general government benefits on the same terms as everyone else. The same issue arises in government contracting.

If the rulings of the courts below are allowed to stand, then they will be important precedents supporting this increasingly widespread violation of the free speech rights and freedom of religious belief of Christians and others who espouse and uphold traditional moral values and Christian doctrine.

In failing to find viewpoint discrimination unconstitutional, the decisions of the courts below are in conflict with the decisions of this Court and of every Circuit Court on viewpoint discrimination.

ARGUMENT

I. This Case Presents Important, Increasingly Urgent Questions of Law Regarding the Free Speech Rights of Those Who Believe in Traditional Moral Values and Christian Doctrine.

Oakland City officials did not have to allow employees to use the City email system and bulletin boards for personal political and social postings. But once they did, they could not engage in viewpoint discrimination. *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Good News Club v. Milford Central School, 533 U.S. 98 (2001); Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). Yet, that is exactly what they did in this case.

Only the politically disfavored Christian employee group, GNEA, was denied use of the email system to announce its existence and activities. When the group posted a notice on the bulletin board announcing the same, City officials took down the notice and confiscated it, which they did not ever do in regard to any other notice posted by any other employee or group. The City officials then threatened to terminate the employees behind GNEA if they continued to try to advance their Christian and traditional moral values message in the workplace. Yet others were allowed to continue to advance the messages and values in which they believed, including groups whose messages and values were directly contrary to those held by the employees behind GNEA.

The City officials consequently violated the free speech rights of Petitioners in at least these three ways. Not just in taking down the posted notice, as recognized by the courts below. But, in addition, in denying them equal use of

the city email system, and then in threatening to terminate them unless they stopped trying to advance their message. These are not "vanishingly small" violations, as the District Court suggested. Indeed, threatening to fire an employee unless he stops advancing his message, using innocent words such as family values and marriage, shuts down the employee's free speech rights on a permanent basis.

Moreover, there is no doubt that City officials engaged in these actions because of the content of GNEA's message, of which they disapproved. This conduct is constitutionally impermissible.

The District Court suggested that the Plaintiffs were not completely precluded from advancing their message in the workplace. But the letter from Hicks discussed above, and the District Court opinion itself, App. 7a, clearly indicated that GNEA's message was seen as homophobic and in violation of AI 71. Moreover, Hicks' letter baldly stated that continued violations of AI 71 would be sanctioned by termination.

Yes, the City has a compelling state interest in stopping discriminatory communications and hate speech. But the traditional Christian doctrines and moral values included in GNEA's communications cannot remotely be characterized as involving such discrimination and hate speech. These are values held by millions and millions of Americans, if not a majority, going back thousands of years, widely held to be socially beneficial. It is not for the City of Oakland, or, frankly, even the Federal courts, to tell citizens that these Christian, Biblically based, traditional moral values are now socially and legally unacceptable, with their advocacy subject to serious government sanctions. Quite to the contrary, advocacy of these Christian, traditional moral values is constitutionally protected by both the Freedom of Religion and Free Speech Clauses. Once City officials allow

other employees to advance their social, moral and political values in the workplace, the officials are constitutionally required to permit advocacy of Christian, traditional moral values on equal terms as well.

The courts below, however, ruled in just the opposite way. It was precisely the belief of the GNEA employees in traditional moral values and Christian doctrines that made use of the words Natural Family, Marriage, and Family Values legally objectionable and sanctionable. This reasoning of the opinions below increases the assault on the free speech of Christians and other advocates of traditional moral values, and makes the decisions even more constitutionally objectionable.

The courts below analyzed this case as involving the limited right to free speech in the workplace of public employees. The District Court ultimately concluded that the City employer's legitimate administrative interests in avoiding workplace disruption outweighed the employee interest in free speech.

But the District Court failed to consider the broad context in which the GNEA communications occurred. As discussed above, a broad range of controversial political, religious, and social topics were raised on the City's email system and bulletin boards. If the City did not find that these communications disrupted the workplace, then it cannot claim that the innocent expression of widely held traditional moral values by GNEA disrupted the workplace. Indeed, there was no significant disruption, as the District Court found. App. 47a, 48a-49a.

Moreover, given the broad range of these other communications, the restrictions and sanctions against the GNEA communications surely did not involve time, place and manner restrictions. App. 18a. In allowing the other

communications, the employer had already determined that the time, place and manner was appropriate.

More fundamentally, however, there is no legal authority or foundation for viewpoint discrimination in the public employee workplace, at least in regard to non-work related speech. Whether this is a public employee free speech case or not, the City employer's viewpoint discrimination detailed above is constitutionally impermissible. Notably, the leading public employee free speech cases, *Pickering v. Bd of Educ of Township High School Dist 205, Will County,* 391 U.S. 563 (1968), and *Connick v. Myers,* 461 U,S. 138 (1983), did not involve viewpoint discrimination.

The importance of this case goes far beyond the free speech rights of the public employees in this case, or even of public employees in general. All across America today, when private organizations seek to use public facilities in any way, they are increasingly being asked to certify that they comply with all antidiscrimination laws. If they advocate traditional moral values or traditional Christian doctrines, this advocacy is now more and more often challenged as violating discrimination prohibitions, and disqualifying the organization for use of the facilities.

The same issue arises when private organizations seek to participate in government programs on equal terms with everyone else. If the organizations advocate traditional moral values or traditional Christian doctrines, they are increasingly challenged as discriminatory and consequently not eligible to participate or receive the same general benefits as others. The same issue arises again increasingly in government contracting.

The rulings of the courts below essentially endorse the position that advocacy of traditional moral values and

standard Christian doctrines does involve discrimination or even hate speech disqualifying the speaker from use of public facilities, government contracting, and participation in general government programs and receipt of general government benefits on the same terms as others. This is a severe, constitutionally impermissible burden on the free speech, and Freedom of Religion as well, of those who believe in traditional moral values and standard Christian doctrines.

II. The Decisions of the Courts Below Directly Conflict with All Decisions of this Court and of the Circuit Courts Regarding Viewpoint Discrimination.

In failing to find viewpoint discrimination unconstitutional, the decisions of the courts below are in conflict with the decisions of this Court and of every Circuit Court on viewpoint discrimination. *E.g. Rosenberger, supra* (public university engaged in unconstitutional viewpoint discrimination in denying funding to an otherwise eligible student publication because of the publication's religious views); *Good News Club, supra* (public school's refusal to allow student religious club to use school facilities because of club's religious viewpoint was unconstitutional); *Lamb's Chapel, supra* (public school district's refusal to rent school facilities to church to show film on family values because of church's religious viewpoint unconstitutionally violated church's First Amendment rights); *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 778 (1985)(organization cannot be excluded from government employee charitable campaign because of political viewpoint); *Cuffley v. Mickes*, 208 F. 3d 702 (8th Cir. 2000)(excluding Ku Klux Klan from state program would be unconstitutional viewpoint discrimination); *Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001)

(school board had engaged in viewpoint discrimination when it sought to exclude the Boy Scouts from using school facilities after hours on grounds that Scouts were in violation of school board's nondiscrimination policy).

These cases are so closely on point with the present case now before this Court. In *Good News Club,* the public school tried to deny a student religious club access to school facilities on the same terms as other student clubs, precisely because of the club's religious viewpoint. This Court found that the school's conduct involved unconstitutional viewpoint discrimination. Similarly, the City of Oakland in this case seeks to deny GNEA access to the city's facilities on the same terms as other employee clubs, because of GNEA's religious viewpoint. Consequently, this must be found to be unconstitutional viewpoint discrimination as well.

In *Lamb's Chapel*, a public school district sought to deny a church use of school facilities to show a film on family values because of the church's religious viewpoint. But the school district routinely rented school space to other groups for their activities. Therefore, it would be unconstitutional viewpoint discrimination not to do the same for the church. Similarly, in the present case, the City of Oakland seeks to deny GNEA use of the city's email and bulletin board facilities because of GNEA's promotion of family values, which the city has labeled homophobic discrimination. But the City routinely allows other employee organizations to use its facilities to communicate their values and messages. So, again, it would be unconstitutional viewpoint discrimination for the City not to do the same for GNEA.

In *Boy Scouts of America v. Till,* the school board sought to exclude the Boy Scouts from use of school facilities because it believed the traditional moral values advocated by the Scouts were discriminatory. Indeed, the

Scouts had moved from mere advocacy to action in excluding atheists and openly gay individuals from membership or adult leadership. But the court held that the Scouts were merely advocating and upholding the traditional values in which they believed. Restricting them because of these traditional values would again be unconstitutional viewpoint discrimination. In the present case, GNEA merely advocates the same traditional values as the Scouts, and doesn't exclude anybody from anything. Excluding GNEA from City facilities because of its advocacy of these values would again be unconstitutional viewpoint discrimination.

CONCLUSION

For all of the reasons discussed above, we respectfully urge this Court to grant the requested Writ of Certiorari in this case, and reverse the rulings of the courts below.

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(4)

No. 06-1619

Supreme Court, U.S.
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In The

Supreme Court of the United States

GOOD NEWS EMPLOYEE ASSOCIATION, REGINA REDERFORD, ROBIN CHRISTY,

Petitioners,

v.

JOYCE M. HICKS, in her individual and official capacities as Deputy Executive Director of the Community & Economic Development Agency of the City of Oakland, ROBERT C. BOBB, in his individual and official capacities as City Manager of the City of Oakland,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF PACIFIC JUSTICE INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE**

Pacific Justice Institute ("PJI") is a nonprofit corporation, operating under 501(c)(3) of the Internal Revenue Code, which engages, in part, in litigation affecting the public interest as it relates to the defense of speech, association, religious exercise, and the establishment clause. As such, PJI routinely represents the rights of people of faith and religious organizations when the above-described First Amendment rights are implicated. The case before the Court will have a profound impact on those whom PJI represents as well as this organization's ability to provide legal assistance. Thus, PJI has a strong interest in the outcome of this matter.

SUMMARY OF ARGUMENT

Amicus urges this Court to grant review and reverse the decision of the Ninth Circuit. This Court is presented with a straightforward question: Do public employees shed their freedom of speech at the water cooler? Respondents think so and the Ninth Circuit agrees. If the decision stands, public employees will be pushed to corners in cafeterias where their speech must be reduced to hushed whispers lest they upset the authorities' status quo.

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* The parties have consented to the filing of this brief.

Under Rule 37.6, *Amicus Curiae*, Pacific Justice Institute, and its counsel of record, Kevin T. Snider, hereby affirm that no counsel for any party authored this brief in whole or in part.

No person or entity, other than the *Amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Respondents silenced Petitioners due to one complaint from one employee stemming from Petitioners' promotion of "natural family, marriage and family values." This regime of censorship led one well-respected commentator to conclude that Respondents went too far, wielding "such unbridled power of prior restraint on speech in the name of protecting order and decorum that they . . . nullify the First Amendment by declaring that even the mild text of the GNEA flyer is inherently disruptive." George F. Will, *Speech Police, Riding High in Oakland*, WASH. POST, June 24, 2007, at B07. The Ninth Circuit endorsed this action, setting a chilling precedent. Allowing Respondents to penalize Petitioners for their viewpoints threatens constitutional rights of thousands of public employees across California and the western states who dare to come out of the closet to support and celebrate traditional families. As such, this petition should be granted.

ARGUMENT

I. Respondents engage in blatant viewpoint discrimination and subject GNEA members' freedom of speech to prior restraints.

Respondents' treatment of the First Amendment right to free speech evokes a scene towards the end of George Orwell's ANIMAL FARM where The Seven Commandments are reduced to a single phrase: "All animals are equal, but some animals are more equal than others." George Orwell, ANIMAL FARM 52 (1945 ed.). Respondents attempt to reduce Good News Employee Association ("GNEA") members' fundamental right to free speech to a single phrase which reads, "All ***perspectives*** are equal, but some ***perspectives*** are more equal than others." This

is antithetical to the law and history of a nation conceived in the "marketplace of ideas." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (U.S. 1967).

Despite their protestations to the contrary, Respondents deliberately distort the "marketplace of ideas" in favor of a particular viewpoint and levy a heavy toll on GNEA members' constitutional freedom of speech. It cannot reasonably be argued that the penalty imposed on GNEA members has any other basis than the expression of a viewpoint which is inconsistent with pro-homosexual orthodoxy. By removing a flyer and subjecting GNEA email communiqués to prior restraints and outright censorship, Respondents sanctioned an egregious deprivation of employees' fundamental right to speak freely on matters of public concern. Enforcers of ideological orthodoxy, Respondents hypocritically proclaim "tolerance" and "diversity." Ironically Respondents express intolerance that suffocates the vital marketplace of ideas which thrives on diverse points of view.

Respondents claim they do not completely suppress a form of speech since there are other avenues of communication open to GNEA members, principally email. But even this avenue is narrow, as it is "subject to certain editorial restrictions," in the words of the district court. *Good News Emple. Ass'n v. Hicks*, No C-03-3542 VRW, 2005 U.S. Dist. LEXIS 5270, at *21 (N.D. Cal. Feb. 14, 2005), *aff'd*, No. 05-15467, 2007 U.S. App. LEXIS 5514 (9th Cir. Mar. 5, 2007). Conditional access to a public forum differentially applied only against GNEA constitutes a prior restraint and violates the Equal Protection Clause of the Fourteenth Amendment.

A. Respondents have engaged in viewpoint discrimination by excluding perspectives from one group deemed unpopular while allowing the unfettered expression of markedly different views from other groups.

This Court has stressed "[t]he public interest in having free and unhindered debate on matters of public importance, the ***core value*** of the Free Speech Clause of the First Amendment." *Pickering v. Board of Education*, 391 U.S. 563, 573 (1968) (emphasis added). It follows that government may not permit speech that expresses one viewpoint yet prohibit speech that expresses the opposite viewpoint; such conduct is presumptively unconstitutional. *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828 (1995). The Ninth Circuit has utterly failed to start with the initial premise that censoring one side of a debate is presumptively unconstitutional. This novel approach by this Circuit is inherently dangerous.

There is "'an equality of status in the field of ideas,'[1] and government must afford all points of view an equal opportunity to be heard." *Police Dept. of City of Chicago v. Mosley,* 408 U.S. 92, 96 (1972). Thus, once government opens a forum for the presentation of all views on an issue, it may not exclude groups expressing views on that issue from a religious standpoint. *Rosenberger*, 515 U.S. at 831; *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 393 (1993). In fact, when the government does not target subject matter for exclusion but particular views taken by speakers on a subject, "the violation of the

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[1] A. Meiklejohn, *Political Freedom: The Constitutional Powers of The People* 27 (1948).

First Amendment is all the more blatant." *Rosenberger*, 515 U.S. at 829. In contrast, the Ninth Circuit's dismissive framework, if it can be called that, poses a significant threat to speech.

Respondents' actions present this Court with an illustrative example of just such a blatant First Amendment violation. GNEA members seek to participate in constitutionally protected First Amendment discourse as members of the public with other members who adhere to distinctly different views. It is precisely this type of discourse, this "marketplace of ideas" that creates an educated citizenry, essential to self-governance and informed decision making. *See Pickering*, 391 U.S. at 571-572. But Respondents create an artificial marketplace where the only ideas exchanged are those deemed acceptable and where views from a religious standpoint[2] by members of GNEA regarding the same subject matter are excluded or are subject to "editorial restrictions." This is viewpoint discrimination in its most insidious form.

B. Respondents have imposed a prior restraint by prospectively enacting a policy to muzzle disfavored speech and subjecting it to "editorial restrictions" determined by city officials, resulting in unbridled discretion.

Improper restraints on communication vary in form and degree, but all restrict the dissemination of ideas. 16A AM. JUR. 2D *Constitutional Law* § 454 (2006). A

[2] The flyer posted by GNEA explains that it is a forum created "*for people of Faith* to express their views on contemporary issues of the day." (emphasis added). The religious character of the views expressed in the flyer is unmistakable.

governmental regulation that prohibits or limits the future dissemination of constitutionally protected speech constitutes a prior restraint. Similarly, a prior restraint occurs when speech is conditioned upon the prior approval of a public official, particularly when this official is afforded unbridled discretion in the decision making process, regardless how frequently such discretion is employed. "It is not merely the sporadic abuse of power by the censor, but the pervasive threat inherent in its very ***existence*** that constitutes the danger to freedom of discussion." *Thornhill v. State of Alabama*, 310 U.S. 88, 97 (1940) (emphasis added). In fact, a system of prior restraint "can only avoid constitutional infirmity if it takes place under procedural safeguards to obviate the dangers of a censorship system." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965); *See also, Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

Rather than recognize the equal status enjoyed by all participants in the field of ideas, Respondents implement prior restraints on free speech created specifically for and applied exclusively against GNEA and its members. GNEA members posted a flyer on their employee bulletin board promoting the group's desire to discuss "the Natural Family, Marriage and Family Values." *Good News*, 2005 U.S. Dist. LEXIS 5270, at *2. The flyer was distributed after other employees' groups, including those advocating homosexual rights – had advertised their political views and activities on the city's email system and bulletin board. *Id.* Some weeks later, Respondents developed and distributed Administrative Instruction 71 ("AI 71"). *Id.* While Respondent Hicks claims AI 71 predated the flyer, the letter accompanying the policy spells out the animus towards GNEA behind AI 71's promulgation:

> [The City] ha[s] recently had incidents . . . where staff has inappropriately posted printed materials that are in violation of [the policy]. Specifically flyers were placed in public view which contained statements of a ***homophobic nature*** and were determined to promote ***sexual orientation based harassment*** . . . Failure to comply [. . .] will include ***disciplinary action up to and including termination.***

Good News, 2005 U.S. Dist. LEXIS 5270, at *8 (emphasis added). Respondents enacted AI 71 and issued the accompanying letter to unlawfully prohibit future dissemination of GNEA flyers and to limit Petitioners' constitutionally protected speech in future email communiqués. Indeed, access to the citywide email system was conditioned upon prior approval of a public official who would ensure that Petitioner Regina Rederford had removed "verbiage that could be offensive to gay people." *Good News,* 2005 U.S. Dist. LEXIS 5270 at *6. Setting aside concerns about the legitimacy of such a standard, the record reflects ***no*** internal appeal process for Ms. Rederford and other members of GNEA to challenge a public official's determination. In fact, there is nothing in the record to indicate the existence of any guidelines that might cast at least a semblance of objectivity in this decision making process. Under the status quo, public officials in the Community and Economic Development Agency in the City of Oakland enjoy unbridled discretion while adversely affected public employees are without recourse.

Where a system of prior restraint is found it "can only avoid constitutional infirmity if it takes place under procedural safeguards to obviate the dangers of a censorship system." *Freedman v. Maryland,* 380 U.S. 51, 58 (1965); *See also, Southeastern Promotions, Ltd. v. Conrad,*

420 U.S. 546 (1975). The district court refers to alternative channels of communication left open to GNEA members as if this were sufficient, without more, to cure Respondents' egregious wrong. *Good News,* 2005 U.S. Dist. LEXIS 5270 at *21-22. As noted, even where a government policy only limits the manner of expression rather than the initial right to communicate, a prior restraint may still be found. Any and all of the necessary procedural safeguards to resuscitate Respondents' draconian policies are conspicuously absent in the record.

"It is not merely the sporadic abuse of power by the censor, but the pervasive threat inherent in its very ***existence*** that constitutes the danger to freedom of discussion." *Thornhill v. State of Alabama*, 310 U.S. 88, 97 (1940) (emphasis added). The district court noted that Respondents have both moved on to other jobs and there is no evidence that their successors "would take the same view of the application of AI 71." *Good News,* 2005 U.S. Dist. LEXIS 5270 at *29. Though current public officials in the City of Oakland may choose to allow constitutionally protected speech, this is beside the point. They may choose to adhere to First Amendment considerations or they may follow their predecessors' path and adjust their actions to accommodate the vacillating winds of political correctness. This choice without constraints underscores the procedural morass created by Respondents' policies.

II. Respondents' position wilts under *Pickering* and its progeny, which weigh heavily in GNEA members' favor.

Citizens cannot be deprived of their fundamental rights simply because they work for the government. *Connick v. Myers*, 461 U.S. 138 (1983). Thus, a State

cannot condition public employment on a basis that infringes upon the employee's constitutionally protected freedom of speech. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Perry v. Sindermann*, 408 U.S. 593 (1972). Whether an employee's speech is constitutionally protected is determined by a two-part test articulated by this Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968). The *Pickering* test asks: (1) whether the speech addresses a matter of public concern, and (2) whether the interest of the employee as a citizen, in commenting on matters of public concern, outweighs the employer's interest in promoting the efficiency of the public services it performs. *Pickering,* 391 U.S. at 568. Thus, speech is unprotected only if its value – as measured by the employee's and the public's interests – is outweighed by the government's interest in effective and efficient provision of services. *Watters v. City of Philadelphia*, 55 F.3d 886, 895 (3d Cir. 1995).

As will be demonstrated below, Respondents' purported interest in the efficiency of its public services and a harmonious workplace are powerfully outweighed by GNEA members' interest in free speech and the protection afforded by the Constitution. The Ninth Circuit rubber-stamped the district court's token attempt at *Pickering* balancing resulting in the sanction of an unconscionable abrogation of GNEA members' First Amendment freedom of speech. As such, *Amicus* urges this Court to revive constitutional protection of Petitioners' speech.

A. GNEA members' speech deals with matters of public concern.

The First Amendment protects discourse between members of the public on matters of public concern.

Connick, 461 U.S. at 138. Speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community. *Id.* at 146. Furthermore, the place where the speech occurs is irrelevant. *See Rankin v. McPherson*, 483 U.S. 378, 388-392 (1987) (holding public employee's discharge violated First Amendment when based on comment by employee as private citizen on a matter of public concern made at work). The district court determined that the message in GNEA's flyer related to a matter of public concern and noted that Respondents did not dispute this conclusion.

B. The *Pickering* balancing test weighs heavily in GNEA's favor.

Because GNEA's flyer addressed a matter of public concern, *Pickering* mandates balancing of GNEA members' interest in expressing their views against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering,* 391 U.S. at 568. In performing this balancing this Court has considered (1) whether the statement impairs discipline by superiors or harmony among co-workers, (2) has a detrimental impact on close working relationships where personal loyalty and confidence are necessary, or (3) impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise. *Id.* at 570-573.

This Court in *Pickering* emphasized "the public interest in having a ***free*** and ***unhindered*** debate on matters of public importance." *Id.* at 573 (emphasis added). This is particularly true where such debate is consistent with a forum's purpose. *See Burnham v. Ianni,*

119 F.3d 668, 679 (8th Cir. 1997) (photo presentation in library display case used to communicate matters of general interest found to be within the forum's purpose). Here, Respondents opened a public forum for the discussion of social, political and other issues of public concern. As previously noted, other employees' groups – including those advocating homosexual rights – had advertised their political views and activities on the city's email system and bulletin board. But when GNEA members attempted to advertise views and activities covering subject matter within the forum's purpose, an open forum was now suddenly closed (in the case of the bulletin board) or limited to viewpoint-based prior restraints (in the case of the email system). The City's message came through loud and clear: "All perspectives are equal, but some perspectives are more equal than others."

In the district court's words, "Workplace disruption is the touchstone of the employer's interest in the Pickering balance." *Good News,* 2005 U.S. Dist. LEXIS 5270, at *22. Yet there is no evidence that GNEA's flyer interfered with the effective functioning of the office. Indeed, Respondents present no evidence that GNEA's flyer disturbed anyone aside from one lesbian employee. As *Rankin* proves, the fact that co-workers become aware of the statements and are upset by them is an insufficient nexus to claim that the "smooth functioning" of the office has been compromised. Here, the so-called "disruption" is so tenuous, so unsubstantiated that even the district court termed it "friction," *id.* at *25, and "a *Pickering* disruption writ small." *Id.* at *23. The retaliation against Ms. Rederford and other GNEA members was not motivated by any legitimate desire to preserve the smooth functioning of the office; rather, Respondents stifled GNEA members' speech

based on its content absent any real showing of workplace dissonance.

The fact that the flyer's message may have taken an unpopular side of a national debate is insufficient to punish it. In *Rankin,* the government employee who brought suit had been fired after expressing approval of the attempt on President Reagan's life. *Rankin v. McPherson*, 483 U.S. 378 (1987). While her statement could be viewed as impairing harmony in the workplace, this Court held in favor of the employee, stating:

> "The burden of caution employees bear with respect to the words they speak will vary with the extent of ***authority*** and ***public accountability*** the employee's role entails. Where, as here, an employee serves no confidential, policymaking, or ***public contact*** role, the danger to the agency's successful functioning from that employee's private speech is minimal." *Id.* at 390-391 (emphasis added).

In the instant case, Ms. Rederford's role as a city employee entailed neither authority nor public accountability. Nor did she serve any confidential, policymaking, or public contact role. Thus, any tension Jennings felt as a result of her interaction with Rederford does not even approximate the tension tolerated by this Court in *Rankin*.

In *Burnham*, the Eighth Circuit recalled the general rule that "the public expression of ideas may ***not*** be prohibited merely because the ideas are themselves offensive to some of the hearers." *Burnham*, 119 F.3d at 678 (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)). Only one employee complained in *Burnham* after viewing a library display case; the Eighth Circuit found this

insufficient to establish an "ambiance of fear" on the school campus. *Id.* at 679. Here, only one employee – Jennings – complained after viewing GNEA's flyer. *Good News,* 2005 U.S. Dist. LEXIS 5270, at *5. Jennings had initiated discussions with Ms. Rederford, after which she reportedly felt scared. *Id.* In short, Jennings initiated interaction with Ms. Rederford for a protracted period of time, encountered viewpoints she did not like, and filed a complaint. City officials briefly investigated the matter and promptly removed the flyer based on this complaint alone. *Id.*

As the *Burnham* court found, so should this Court conclude: Upholding the government's approach to the First Amendment "would permit the suppression of too much speech on arbitrary and capricious grounds." *Burnham*, 119 F.3d at 680. No less arbitrary and capricious grounds exist in the instant case. The Ninth Circuit merely avers that GNEA's speech adversely affected the efficiency of the City's operations and substantially disrupted the work environment without presenting evidence to support this bald assertion. Making matters worse, the Ninth Circuit approvingly quotes the district court's evaluation of GNEA members' speech interest as "vanishingly small." *Good News Emple. Ass'n v. Hicks*, No. 05-15467, 2007 U.S. App. LEXIS 5514, at *5 (9th Cir. Mar. 5, 2007), quoting *Good News,* 2005 U.S. Dist. LEXIS 5270, at *9. Proceeding to balance a baseless assertion of workplace disruption against a speech interest recognized by this Court as a core value of the First Amendment, the Ninth Circuit arbitrarily favors the former while overlooking the latter. If the holding stands, municipalities across the state could rely on arbitrary and capricious grounds to suppress advocacy of any matter of

public concern considered contributive to inefficiency and disharmony in the workplace.

C. The lower court decisions in this case express tacit approval of a heckler's veto in the public employee speech arena and encourage further censorship.

The government's ostensible concern with efficiency and harmony provides parties disagreeing with GNEA's speech a "heckler's veto." *See Terminiello v. Chicago*, 337 U.S. 1 (1949). The district court couched its implicit approval of this veto in terms of "maintaining a reasonably harmonious workplace in the face of strongly held opposing beliefs." *Good News,* 2005 U.S. Dist. LEXIS 5270, at *25. But the court neglected to acknowledge that Respondents created a public forum for the free discussion of inherently contentious and divisive political and social issues and now attempt to defend their discriminatory treatment against GNEA as requisite to maintain harmony. Respondents submit no evidence of an employee morale crisis and they fail to provide one scintilla of proof that office efficiency has been adversely affected. Instead, Respondents base their entire claim of discord in the office upon one complaint from one employee. *Amicus* can hardly envision a clearer example of a heckler's veto.

CONCLUSION

The governing authorities in Orwell's ANIMAL FARM claimed absolute power and abused it absolutely, ultimately reducing their governing document to a single

phrase purporting to afford equality but in reality accomplishing anything but that. Respondents do the same. Effectively claiming absolute power, they seek to reduce First Amendment freedom of speech to a cheap version of its true self, divested of any import and malleable to ever-changing purposes. GNEA members' freedom of speech is protected by the First Amendment to our Nation's Constitution, yet Respondents categorically deny this freedom based on nebulous notions of political correctness. The punishment levied against GNEA and its members by Respondents is wholly indefensible. Indeed, Respondents' action survives only if they are afforded absolute power to smother employee speech. For the foregoing reasons, *Amicus* urges this Court to right this deplorable wrong and accept the petition for writ of certiorari.

Dated: July 5, 2007

Respectfully submitted,

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(2)

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IN THE

Supreme Court of the United States

GOOD NEWS EMPLOYEE ASSOCIATION, REGINA REDERFORD, ROBIN CHRISTY,
Petitioners,

v.

JOYCE M. HICKS, in her individual and official capacities as Deputy Executive Director of the Community & Economic Development Agency of the City of Oakland, ROBERT C. BOBB, in his individual and official capacities as City Manager of the City of Oakland,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* UNITED STATES JUSTICE FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The City of Oakland has enacted a restrictive antidiscrimination/nonharassment policy that bars future use of potentially harassing speech in the workplace. Specifically, the City has banned the Good News Employee Association from posting flyers that use the words "natural family, marriage, and family values" because the City contends that the Good News Employee Association's viewpoint on same-sex marriage conflicts with the City's antidiscrimination policy.

1. Does the City of Oakland's opening of a limited public forum, which allows city employees to post political, religious, and social views on an employee bulletin board and interoffice email system, require a strict scrutiny standard of review where viewpoint discrimination has been enforced against only select employees?

2. When does a municipal employer have a "legitimate administrative interest" in censoring the terms "natural family," "marriage," and "family values" on an open employee bulletin board and interoffice email system where employee views about social events, hate, religion, homosexuality, terrorism, politics, and war are allowed?

3. Can a public official's qualified immunity be abrogated when he/she rejects a faith-based organization's equal access to an employee bulletin board because the terms "natural family," "marriage," and "family values" are considered disruptive to the efficient operation of a municipal workplace?

4. Is it a prior restraint for a municipal employer to declare, as a matter of policy, the terms "natural family," "marriage," and/or "family values" to be hate-speech 'per se'?

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STATEMENT OF INTEREST OF *AMICUS* [1]

Amicus seek to insure that state and local government agencies alike – in their zealous attempts to "protect" against workplace discrimination – do not enact employment policies designed to compel acceptance of the homosexual lifestyle through content-based viewpoint discrimination against speech on such a notable issue of public concern. State and local government agencies have erroneously equated this lifestyle choice to a special, protected, status, unmatched by any other protected class under any American law. Municipalities such as the City of Oakland have thus wielded their power as law and policymakers to force private groups to endorse and condone *beliefs and behavior* in the name of advancing "civil rights."

Constitutional free speech guarantees are in undeniable tension, if not conflict, with the statutory rights of employees to be free from discriminatory verbal harassment that creates a hostile work environment. Although this tension has gen-

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[1] Pursuant to Rule 37, subdivision (6), this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. It should be noted however, that *amicus* was previously counsel for petitioner when the civil complaint was initially filed in the United States District Court, Northern Division California. Richard D. Ackerman, who handled the case while employed for USJF, took the case with him when he left USJF to go into private practice in 2003; however, Gary G. Kreep – Executive Director of USJF – remained on file as co-counsel of record until February 14, 2005, when the district court issued its final ruling. Thereafter, Mr. Ackerman, as an attorney with the Pro-Family Law Center, appealed the district court's decision without the involvement of USJF. As such, *amicus* has not been counsel for a party to the action since the district court's decision on February 14, 2005. *Amicus* submits the accompanying brief pursuant to Rule 37 of the Rules of this Court as *amicus curiae* in support of Petitioner. The brief is submitted with the consent of both the Petitioner and the Respondent, whose consent letters have been lodged with the Clerk of the Court.

erated lively debate in scholarly legal journals, the United States Supreme Court has yet to address the issue. This case presents one aspect of the problem: the use of Administrative Employment Policies prohibiting certain kinds of future speech, on the basis of its content, as a remedy for hostile environment employment discrimination.

The United States Justice Foundation is a nonprofit corporation organized under the laws of the State of California and dedicated to the preservation of civil and human rights. Since its inception in 1979, USJF has regularly assisted individuals and classes, not only to seek redress for significant acts of injustice, but also to promote valuable public policy matters.

Amicus has concerns that the holding of the Ninth Circuit Court of Appeals in this case, if left unchecked, will set a precedent for other government entities to enact similar anti-discrimination policies designed to suppress unpopular and/or unfavorable expressions under the guise of creating a 'safe work environment,' which, in reality, results in a prior restraint of otherwise constitutionally protected speech and viewpoint based free speech discrimination. *Amicus* urge the Court to grant the petition.

SUMMARY OF THE ARGUMENT

This case presents the profoundly important issue of whether a government agency may, in an effort to promote a non-hostile work environment, prohibit a person from engaging in speech that is perceived to be offensive, but is nonetheless protected by the First Amendment of the United States Constitution.

Amicus curiae will offer two arguments: First, that the City of Oakland's antidiscrimination/nonharassment policy constitutes a prior restraint of expression that is clearly protected by the First Amendment of the Constitution of the United States. Second, that the City's prohibition against any

use of the words "natural family," "marriage," and "family values" violates the right of members of the Good News Employee Association to free speech and equal protection of the laws guaranteed by the United States Constitution.

No decision by the United States Supreme Court has, as yet, declared that the First Amendment permits restrictions on speech creating a hostile work environment. Accordingly, a serious question arises whether or not the prohibition of the phrases "natural family," "marriage," and "family values" in this case constitutes an impermissible prior restraint on Ms. Rederford's and Ms. Christy's speech.[2]

Moreover, one of the bedrock principles of free speech jurisprudence is the unshakeable notion that the government may not prohibit the expression of an idea simply because society finds the idea or viewpoint offensive or disagreeable. Antidiscrimination employment policies, like the one here, that regulate speech on the basis of content and viewpoint, threaten the very freedom that this country was founded upon.

ARGUMENT

I. The Court should grant review because the City of Oakland has enacted an antidiscrimination/ nonharassment policy that is a prior restraint of speech not permitted under the First Amendment of the United States Constitution.

The term 'prior restraint' is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.[3] Temporary restraining orders, permanent injunc-

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[2] Petitioners in no way concede that the mere words "natural, family, marriage, and values" alone, nor, as used in this case, create a hostile work environment.

[3] *Alexander v. United States* (1993) 509 U.S. 544 [550, 113 S.Ct. 2766, 2771, 125 L.Ed.2d 441] [*citing* M. Nimmer, Nimmer on Freedom of

tions, administrative employment policies prohibiting the use of certain words—i.e., all governmental action that forbids speech activities—are classic examples of prior restraints.[4] Prior restraints of speech are particularly inimical because they do not merely place a burden on the speaker's ability to communicate a message; rather they erase that message before its effects can be assessed.[5]

The law generally prohibiting prior restraints on speech is well-settled. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption ***against*** its constitutional validity."[6] As such, the government bears a heavy burden to justify a prior restraint.[7] The presumption is by no means rebutted here. The antidiscrimination/nonharassment policy, adopted by the City of Oakland, and the memorandum dated February 20, 2003 that interprets the policy, bars use of the words "natural family," "marriage," and "family values." The policy at issue here—enjoining any future use in the workplace of specified words—not only restrain speech, but does so unmistakably on content grounds.

Attaching liability to the utterance of words in the workplace is invalid for the simple reason that this speech is fully protected speech.[8] No one claims that the words "natural family," "marriage," and "family values" qualify as fighting

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Speech § 4.03, p. 4-14 (1984)]. See also, *Near v. Minnesota ex rel. Olson* (1931) 283 U.S. 697 [51 S.Ct. 625, 75 L.Ed. 1357].

[4] M. Nimmer, Nimmer on Freedom of Speech § 4.03, at 4-16 (1984).

[5] *Aguilar v. Avis Rent a Car System, Inc.* (1999) 21 Cal. 4th 121, 193 (dis. opn. of Kennard, J.).

[6] *Bantam Books, Inc v. Sullivan* (1963) 372 U.S. 58, 70 [83 S.Ct. 631, 9 L.Ed.2d 584].

[7] *New York Times Co. v. United States* (1971) 403 U.S. 713, 714 [91 S.Ct. 2140, 2141, 29 L.Ed.2d 822].

[8] *Avis Rent a Car System, Inc. v. Aguilar* (2000) 529 U.S. 1138, 1141 [120 S.Ct. 2029, 146 L.Ed.2d 971] (dis. opn. of Thomas, J.).

words,[9] obscenity,[10] or some other category of speech currently recognized as outside the scope of First Amendment protection.[11] Quite the contrary, the policy at issue constitutes a broad prohibition touching on core protected speech. It applies to words that, although perceived as offensive by one employee, may be used to convey, ideas or emotions and are therefore shielded by the First Amendment. Furthermore, the content-based nature of the City's restriction—which bars derogatory speech based upon race/national origin/ancestry, gender, sexual orientation, age, religion, marital status/ pregnancy, military status, medical condition, and physical and/or mental disability, but not because of political affiliation, union membership, or numerous other traits—renders it invalid under the United States Supreme Court's current jurisprudence.[12]

The speech that the City of Oakland has enjoined is expression of a particular viewpoint, on a particular subject. In spite of the laudable goal of creating a more welcome workplace climate, such a ban is a classic prior restraint of the kind that courts may not impose.[13] As the United States Supreme Court made clear in *R.A.V. v. City of St. Paul*, targeting speech on the basis of its message or viewpoint is not permissible under the First Amendment of the United States

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[9] *Chaplinsky v. New Hampshire* (1942) 315 U.S. 568, 572 [62 S.Ct. 766, 86 L.Ed. 1031].

[10] *Miller v. California* (1973) 413 U.S. 15, 24 [93 S.Ct. 2607, 27 L.Ed.2d 419].

[11] See e.g., *Pittsburgh Press Co. v. Human Rel. Comm'n* (1973) 413 U.S. 376 [93 S.Ct. 2553, 37 L.Ed.2d 669] [validating prohibition that extended only to commercial speech already determined to be legally unprotected by the First Amendment].

[12] *R.A.V. v. St. Paul* (1992) 505 U.S. 377, 391 [112 S.Ct. 2538, 120 L.Ed.2d 305].

[13] *Near v. Minnesota* (1931) 283 U.S. 697 [51 S.Ct. 625, 75 L.Ed. 1357].

Constitution.[14] The desire to protect victims and vulnerable groups from discrimination in all forms is admirable. Yet, so worthy a goal does not permit courts or agencies to circumvent the clear precepts of the Constitution.

The City's antidiscrimination/nonharassment policy impermissibly restricts speech based on the mere assumption that these words will inevitably create a hostile and abusive work environment amounting to employment discrimination.[15] The "forbidden words" at issue here are a far cry from slurs, vulgarity and derogatory epithets; however, even the prior restraint of slurs, vulgarity, and derogatory epithets in the workplace—and *even* by a person who has previously engaged in discriminatory conduct in the workplace—is unconstitutional. This is because the offensive content and effect of using any one, or more, of a list of verboten words cannot be determined in advance. The line between permissible advocacy and impermissible incitation to crime or violence depends on the setting in which the speech occurs, the exact words spoken, and the content of the utterance.[16]

The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others

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[14] *R.A.V. v. St. Paul* (1992) 505 U.S. 377 [112 S.Ct. 2538, 120 L.Ed. 2d 305].

[15] Even if some types of harassing speech in the workplace do not enjoy First Amendment protection, there has been no showing that a prior restraint, rather than a less severe remedy of money damages for any future violations, is necessary to prevent a hostile work environment.

[16] *Young v. American Mini Theatres* (1976) 427 U.S. 50, 66 [96 S.Ct. 2440, 49 L.Ed.2d 310].

beforehand.[17] It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.

The instant policy is insufficiently tailored in at least three respects, raising serious doubts concerning whether "the challenged provisions of the policy burden no more speech than necessary to serve a significant government interest."[18] First, the policy prohibits even a single utterance of a prohibited word. Yet a hostile environment for purposes of the California Fair Employment and Housing Act[19] only arises "when the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[20] An employee surely has a substantial interest in a work environment that is not hostile or abusive but this interest is invaded in an intolerable manner only when harassing speech actually produces a hostile or abusive environment.[21] It cannot be known in advance whether a particular utterance will create (or recreate) a hostile environment under this standard, and speculation simply does not suffice to rebut the heavy presumption against a prior restraint.[22] Second, there has been no showing that the

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[17] *Southeastern Promotions, Ltd. v. Conrad* (1975) 420 U.S. 546, 558-559 [95 S.Ct. 1239, 43 L.Ed.2d 448].

[18] *Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753, 765 [114 S.Ct. 2516, 129 L.Ed.2d 593].

[19] Cal. Govt. Code § 12940.

[20] *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 21 [114 S.Ct. 367, 126 L.Ed.2d 295].

[21] *Aguilar v. Avis Rent a Car System, Inc.* (1999) 21 Cal 4th 121, 184 (dis. opn. of Kennard, J.).

[22] *Avis Rent a Car System, Inc. v. Aguilar* (2000) 529 U.S. 1138, 1143 [120 S.Ct. 2029, 146 L.Ed. 2d 971] (dis. opn. of Thomas, J.).

prospect of a money damages judgment for future violations would fall short of deterring petitioners from creating a hostile environment. Third, the prohibition applies without regard to whether the utterance is directed at Judith Jennings, the sole complaining co-worker in this case, and contains no exception for speech that might contribute to reasoned debate.

It is significant that we deal here with a claim at the core of the First Amendment – that the State is suppressing speech that it dislikes. We as a nation so value the free exchange of ideas that we are willing to tolerate, even offensive ideas, knowing that "one man's vulgarity is another's lyric."[23] By embracing the City of Oakland's all-encompassing ban against the use of any word that may imply any amount of hostility towards a limited selection of individuals in the workplace, the Ninth Circuit gutted the bedrock principles underlying the prior restraint doctrine and effectively, yet erroneously, created a "work-place speech exception" to the First Amendment. For the same reason that the Court evaluates prior restraints under a heavy presumption ***against*** their validity, the Court should decide the issue now.

II. The Court should grant review because the City of Oakland's prohibition against any use of the words "natural family," "marriage," and "family values" violates the right of members of the Good News Employee Association to free speech and equal protection of the laws.

The Community and Economic Development Agency of the City of Oakland prohibits certain flyers and posters from being displayed on workplace "bulletin boards" open to all employees based on the content and viewpoint of the message expressed on the flyer or poster. The City's policy violates the First Amendment right to Freedom of Speech and the

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[23] *Cohen v. California* (1971) 403 U.S. 15, 25 [91 S.Ct. 1780, 1788, 29 L.Ed.2d 284].

Fourteenth Amendment guarantee of Equal Protection under the laws because there is no appropriate governmental interest suitably furthered by the City's differential treatment.

There is no question that the City of Oakland may legally preserve the property under its control for the use to which it is dedicated.[24] The extent to which the Government may restrict access depends on the nature of the relevant forum. But the government is powerless to restrict expression whether because of its message, its ideas, its subject matter, or it's content.[25] Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, the government may not grant access to a given forum to people whose views it finds acceptable, while denying it to whose views it finds "unacceptable."[26]

The principal purpose of a traditional public forum is the free exchange of ideas; therefore, speakers may be excluded from a public forum only when necessary to serve a compelling state interest which is narrowly drawn to achieve the desired goal.[27] Similarly, when the Government has intentionally designated a place or means of communication as a public forum, speakers may not be excluded without a compelling governmental interest.[28] Access to a nonpublic forum, however, can be restricted as long as the restrictions

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[24] *Lamb's Chapel v. Center Moriches Union Free School Dist.* (1993) 508 U.S. 384, 390 [113 S.Ct. 2141, 124 L.Ed.2d 352].

[25] *Cohen v. California* (1971) 403 U.S. 15, 24 [91 S.Ct. 1780, 1787, 29 L.Ed.2d 284].

[26] *Police Department of the City of Chicago v. Mosley* (1972) 408 U.S. 92 [92 S.Ct. 2286, 33 L.Ed.2d 212].

[27] *Perry Education Assn. v. Perry Local Educator' Assn.* (1983) 460 U.S. 37, 45 [103 S.Ct. 948, 954, 74 L.Ed.2d 794].

[28] *Id.* at 45. See also, *Widmar v. Vincent* (1981) 454 U.S. 263 [102 S.Ct. 269, 70 L.Ed.2d 440].

are "reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's view."[29]

The City of Oakland opened up a forum – i.e., the workplace bulletin boards – for employees to speak their views on political issues, post comics, share ideas, and advertise their various associational activities.[30] When Ms. Rederford and Ms. Christy, members of the Good News Employee Association, asked for the same opportunity to openly communicate with others about their Christian activities and views on family, the City of Oakland denied them equal access to the designated public forum. The City violated the First Amendment and Fourteenth Amendment when it denied access to the members of the Good News Employee Association solely to suppress the point of view they supported on an otherwise includible subject – namely the politically charged debate about same-sex marriage."[31]

In *Lamb's Chapel v. Center Moriches Union Free School District*, the Supreme Court concluded that a regulation which excludes all religions, while advancing or permitting advocacy of non-religious associations violates the First Amendment.[32] The court held that a public school district violated the First Amendment by opening school facilities for after-school meetings of associations, other than religious organi-

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[29] *Id.* at 46. See also, *Cornelius v. NAACP Legal Defense and Educational Fund* (1985) 473 U.S. 788, 800 [105 S.Ct. 3439, 87 L.Ed.2d 567].

[30] Even if the Court views the bulletin board as essentially a non-public forum, the government may only restrict access, if such efforts are reasonable and not an effort to suppress expression. The City of Oakland fails to meet even the rational basis standard and, thus, its viewpoint based exclusion of petitioners' religious beliefs and political opinions from the employee bulletin board is unconstitutional.

[31] *Lamb's Chapel v. Center Moriches Union Free School District* (1993) 508 U.S. 384 [113 S.Ct. 2141, 124 L.Ed.2d 352].

[32] *Ibid.*

zations.[33] The court noted that although a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he holds on an otherwise includible subject.[34]

The same principles were expressed in *Rosenberger v. Rector and Visitors of University of Virginia.*[35] In *Rosenberger*, the University of Virginia, a state school, authorized payments for the printing of student publications. A student association that "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality" was excluded from such funding.[36] The Supreme Court held that the exclusion of all religious organizations from the benefits given to the other student associations was unconstitutional.[37] The court noted that it is as objectionable to exclude both a theistic and an atheistic perspective on the public debate about racism, as it is to exclude one, the other, or yet another political, economic, or social viewpoint on a given subject.[38]

Both *Lamb's Chapel* and *Rosenberger* involve the same principles as the matter at hand. Similar to here, the government was not required to make facilities or funding available to any group. Once such benefits were voluntarily afforded by the governmental agency, however, an outright exclusion of religious groups or messages was unconstitutional. Likewise, having provided the forum of a bulletin board for its

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[33] *Ibid.*

[34] *Id.* at 393-394

[35] *Rosenberger v. Rector and Visitors of University of Virginia* (1995) 515 U.S. 819 [115 S.Ct. 2510, 132 L.Ed.2d 700].

[36] *Ibid.*

employees, it is unconstitutional for the City of Oakland to exclude the religious or socially conservative viewpoint on the topic of same-sex marriage.[39]

A court order, a legislative act, and an administrative policy that regulate speech on the basis of its topic are called content-based regulations and are presumptively invalid.[40] A governmental prohibition that regulates speech on the basis of the particular views or biases that the speaker expresses about a topic is termed a viewpoint regulation and is likewise presumptively invalid, as 'an egregious form of content discrimination.'[41]

The antidiscrimination/nonharassment policy at issue here is both a content-based regulation and an infringement on one speaker's viewpoint. It is based on content because it prohibits the use of particular words for their communicative impact – their potential to offend the person who hears it.[42] It is based on viewpoint because it prohibits the utterance of "natural family, marriage, and family values," words that the City claims convey and embody a particular bias against same-sex marriage.[43]

The proper test to determine the validity of the content and viewpoint-based prohibition on the use of certain words at issue here is whether the ban is necessary to serve a compel-

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[39] *See Lister v. Defense Logistics Agency* (2007) 482 F.Supp. 2d 1003, 1010-1011.

[40] *Rosenberger v. Rector and Visitors of University of Virginia* (1995) 515 U.S. 819, 828 [115 S.Ct. 2510, 132 L.Ed.2d 700].

[41] *Id.* at 829.

[42] *Texas v. Johnson* (1989) 491 U.S. 397, 411-412 [109 S.Ct. 2533, 2543-2544, 105. L.Ed.2d 342].

[43] *R.A.V. v. St. Paul* (1992) 505 U.S. 377, 391-393 [112 S.Ct. 2553, 37 L.Ed.2d 669].

ling state interest and narrowly drawn to achieve that end.[44] The City claims that the purpose of prohibiting words like "natural family," "marriage," and "family values" and denying members of the Good News Employee Association equal access to advertise their club, is to prevent workplace harassment and quell a potentially hostile work environment. As the Supreme Court held in *Cornelius v. NAACP Legal Defense and Educational Fund*, even "the existence of reasonable grounds for limiting access to a *nonpublic forum* will not save a regulation that is in reality a façade for viewpoint-based discrimination."[45] Under our system of government, the State may not prohibit the dissemination of views simply because they are controversial, distasteful, or disturbing. To sanction such a prohibition would be a complete repudiation of the philosophy of the Bill of Rights.[46] The City of Oakland may not vindicate its interest in preventing a hostile work environment by the wholesale exclusion of a religious group's viewpoint on a matter of public concern—namely same-sex marriage—or by permitting public discussion on ***all but this one*** hotly-contested political issue.[47]

In addition, the policy adopted by the City of Oakland prohibits more speech than necessary to promote the government's interest in eradicating invidious employment discrimination. To establish employment discrimination by verbal harassment, the employee must show that the workplace is permeated with discriminatory intimidation, ridicule, and

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[44] *Perry Ed. Assn. v. Perry Local Educators' Assn.* (1983) 460 U.S. 34, 45 [103 S.Ct. 948, 74 L.Ed.2d 794].

[45] *Cornelius v. NAACP Legal Defense and Educational Fund* (1985) 473 U.S. 788, 811 [105 S.Ct. 3439, 87 L.Ed.2d 567].

[46] *Planned Parenthood Shasta-Diablo, Inc. v. Williams* (1995) 10 Cal.4th 1009, 1027 (dis. opn. of Kennard, J.)

[47] *Police Department of the City of Chicago v. Mosley* (1972) 408 U.S. 92 [92 S.Ct. 2286, 33 L.Ed.2d 212].

insult, . . . that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.[48] It is impossible to demonstrate in advance that any particular workplace speech, let alone use of such words as "natural family," "marriage," and "family values," will create a hostile work environment, much less that it will produce direct, immediate, and irreparable injury. The mere speculative claim of potential for disruption of the workplace is an insufficient basis by itself for a limitation of otherwise protected speech.[49] Moreover, if the use of the bulletin board causes, in fact, the disruption feared by the City of Oakland officials, the government can simply take down the board or limit messages to those posted by the agency itself.

An administrative policy specifically prohibiting use of the words "natural family," "marriage," and "family values" and not just utterances that actually produce a hostile work environment, is not narrowly drawn to serve the State's compelling interest in eliminating employment discrimination.[50] The City of Oakland's policy is far from being narrowly tailored to a substantial governmental interest. The City's blatant exclusion of only the religious viewpoint on same-sex marriage from the workplace bulletin boards is based on the content of message and the opinion of the

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[48] *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 21 [114 S.Ct. 367, 370, 126 L.Ed.2d 295].

[49] *U.S. v. National Treasury Employees Union* (1995) 513 U.S. 454, 476 [115 S.Ct. 1003, 130 L.Ed.2d 964].

[50] The City of Oakland's policy goes even one step further. It prohibits every utterance of an insult, demeaning comment, and derogatory slur in the workplace based on only the following designations: race, color, religion, sex, pregnancy, marital status, age, national origin, physical/mental disability, medical condition, sexual orientation, and military status. Such a prohibition against any future offensive workplace speech on the basis of content and viewpoint is invariably and necessarily unconstitutional.

speaker. This example of overt viewpoint discrimination only fosters and encourages the type of hostile work environment the City seeks to abolish.

In the early part of the twentieth Century, American courts tried to prohibit and punish the dissemination of communist ideas, but the United States Supreme Court struck down these decisions with a resounding no. The Ninth Circuit has reopened the door to censorship with a resounding yes. The government is now free to prohibit the expression of ideas it dislikes and courts can enforce these prohibitions. One of the truths we hold to be self-evident is that a government that tells its citizens what they may say will soon be dictating what they may think. Once again, the citizenry call upon the highest court in this land to restore their inalienable right to speak freely without punishment for or suppression of their personal convictions.

CONCLUSION

There is a growing threat to the very existence of freedom of speech in the workplace, all in the name of eliminating unlawful "discrimination." Lawmakers and courts, at the state and federal level, like the City of Oakland in the case at hand, are wrongly usurping to themselves the role of defining what words and phrases alone create a de facto "hostile work environment" for the purpose of stating a claim of unlawful harassment under the Fair Employment and Housing Act. Reaching far beyond the traditional "workplace violence" laws that target discrimination based on conduct, regulations such as the Oakland policy at issue here actually enjoin the use of specific words or phrases based on the speaker's political and/or religious viewpoint. Such policies unreasonably restrict the free speech rights of government employees in violation of the First Amendment.

Based on all of the foregoing, the Court is urged to grant the petition for a writ of certiorari to address and resolve these issues.

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